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No.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

FOREMOST INSURANCE COMPANY
AND SHIRLEY ELISER,
Petitioners,

versus

PANSY F. RICHARDSON, DONALD B. RICHARDSON, PATRICK S. RICHARDSON, JOSEPH S. RICHARDSON, LARRY S. RICHARDSON, CARLA RICHARDSON AND JUNE G. ALLEN,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals For the Fifth Circuit

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PETITION FOR CERTIORARI

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QUESTION PRESENTED

Should the admiralty jurisdiction of the federal courts be extended to accidents occurring between purely recreational boats in which there is absolutely no commercial activity involved?

LIST OF PARTIES PURSUANT TO RULE 21.1(b)

1. Petitioners: Foremost Insurance Company and Shirley Eliser (Defendants-Appellees, below)

2. Respondents: Pansy F. Richardson, Donald B. Richardson, Patrick S. Richardson, Joseph S. Richardson, Larry S. Richardson and Carla Richardson (Plaintiff-Appellants, below)

3. Respondent, June G. Allen (Defendant-Appellee, below)

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On Petition for a Writ of Certiorari to the
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For the Fifth Circuit

PETITION FOR CERTIORARI

The petitioners, Foremost Insurance Company and Shirley Eliser, defendants-appellees below, respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of

Appeals for the Fifth Circuit entered in this case on April 2, 1981, reversing the judgment of the United States District Court for the Middle District of Louisiana entered on May 23, 1979.

OPINIONS BELOW

The opinion of the Court of Appeals is reported as *Richardson v. Foremost Ins. Co.*, 641 F.2d 314 (5th Cir. 1981). The opinion of the District Court is reported as *Richardson v. Foremost Ins. Co.*, 470 F.Supp. 699 (M.D. La. 1979). The opinions are reprinted in the Appendix commencing on pages 1a and 8a respectively.

JURISDICTION

The judgment of the Court of Appeals was entered April 2, 1981. A timely motion for rehearing was denied by that Court on May 4, 1981, and this petition for certiorari was filed within 90 days of that date. This Court has jurisdiction to review the judgment by Writ of Certiorari under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES

I.

U.S. Constitution, Article III, Section 2. See Appendix "D" for verbatim text at pp. 27a-28a.

II.

28 U.S.C. §1254. See Appendix "D" for verbatim text at pp. 28a-29a.

III.

28 U.S.C. §1333. See Appendix "D" for verbatim text at p. 29a.

IV.

33 U.S.C. §154. See Appendix "D" for verbatim text at pp. 29a-30a.

STATEMENT OF THE CASE

This petition for writ of certiorari puts at issue the scope of admiralty jurisdiction granted the federal courts pursuant to Article III, Section 2 of the U.S. Constitution, and 28 U.S.C.A. §1333.

The incident giving rise to this litigation involved a collision between two "pleasure" boats. One was an eighteen foot pleasure boat powered by a 185 h.p. Johnson outboard motor that was being used for water skiing purposes at the time of the accident. The other was a sixteen foot "bass boat" powered by an outboard motor that was used exclusively for pleasure fishing. At the time of the accident the two boats were headed in opposite directions on the Amite River. The point of impact was in a curve some one-half to three-quarters

of a mile downstream from the French Settlement bridge. The bass boat was proceeding northward and apparently made a left turn into the path of the southbound ski boat.

As outlined by the trial judge in his opinion (at 470 F.Supp. 699, 700), the following facts are undisputed:

(1) One boat was used for pleasure boating, such as boat riding and water skiing, and at the time of the accident the boat was actually pulling a skier on a zip sled;

(2) The other boat was used exclusively for pleasure fishing and was described as a bass boat;

(3) Neither boat had ever been used in any "commercial maritime activity" before the accident;

(4) At the time of the accident neither boat was involved in any "commercial maritime activity" of any sort;

(5) Neither of the two drivers of the boat were being paid to operate the boat nor was this activity in any way part of their regular type of employment;

(6) None of the passengers on either boat were engaged in any kind of "traditional

maritime activity" either before or at the time of the accident;

(7) Neither of the boats involved were under hire in any traditional maritime form;

(8) There is no evidence to indicate that any "commercial activity", even in the broadest admiralty sense, had ever been previously engaged in by either of the boats in question, and in fact the two boats would have to be classified as "purely pleasure craft", not in any way "involved in commerce"; and,

(9) There was no other instrumentality involved in this accident that had even a minor relationship to "admiralty" or "commerce", i.e. a buoy, barge, oil drilling appartus, etc. Appendix "B" at pp. 9a-10a.

Respondents brought an action to recover for the collision between these two pleasure boats. The United States District Court for the Middle District of Louisiana dismissed for want of admiralty jurisdiction and the plaintiffs (respondents) appealed. The Fifth Circuit Court of Appeals reversed the District Court decision and remanded for consideration of the case on the merits. Petitioners' application for rehearing was denied and, from this decision, petitioners have filed this petition for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit.

REASONS FOR GRANTING THE WRIT

When an accident involving one or more vessels occurs on or in a navigable body of water and involves purely pleasure boats in which there is not the slightest scintilla of "commercial" activity involved, then the admiralty jurisdiction of the federal court should not be invoked. This conclusion and the advisability of granting a writ of certiorari are supported by the following reasons and authorities.

I.

The Law Of Admiralty Is Specially Designed For The Shipping Industry, Not Small Pleasure Boats, And A Significant Relationship To Traditional Maritime Commerce For Purposes Of Admiralty Jurisdiction Is Met Only When The Persons Or Events Involved Have Some Connection To Commerce.

The admiralty jurisdiction of the federal courts derived from the conviction of the members of the Constitutional Convention that there was a need for a uniform body of laws, in general harmony with the laws of other maritime nations, for the conduct of the shipping business. Thirteen separate bodies of laws were thought quite unacceptable for the governance of international trade. Regulation of the shipping industry was close to the conduct of foreign affairs, and

those engaged in the industry were thought to have a need of predictability for their rights and liabilities.[1] The admiralty jurisdiction was created to serve commercial shipping interests by providing a uniform body of law for the resolution of legal disputes arising among those engaged in it.

Prior to *Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249, 93 S.Ct. 493, 34 L.Ed.2d 454 (1972), the general rule concerning maritime torts had been that "the jurisdiction of the admiralty is exclusively dependent upon the locality of the act." 409 U.S. at 253, 93 S.Ct. at 497, quoting from *Thomas v. Lane*, 23 F.Cas. pp. 957, 960, No. 13,902 (C.C.Me. 1813). But, as this Court noted as early as 1850, admiralty scholars had suggested that maritime locality alone was insufficient basis for admiralty jurisdiction. In recent times, several lower federal courts, including the Fifth Circuit, have held that a nexus with maritime commerce is an additional requirement for the invocation of admiralty jurisdiction. *Kelly v. Smith*, 485 F.2d 520 (5th Cir. 1973); *Adams v. Montana Power Co.*, 528 F.2d 437 (9th Cir. 1975); *Chapman v. United States*, 575 F.2d 147 (7th Cir. 1978).

Justice Stewart, for a unanimous Court in *Executive Jet*, held that locality alone was not a sufficient basis to

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1 The history is traced in Stolz, *Pleasure Boating and Admiralty, Erie at Sea*, 51 Cal.L.Rev. 661, particularly 666 et seq. and in Chapter 1 of Gilmore and Black, *The Law of Admiralty* (2nd Edition).

invoke the admiralty jurisdiction of the Court. While the facts of that case involved an airplane crash, and the actual holding was so restricted, much of the opinion discussed this Court's dissatisfaction with the locality alone test as a basis for admiralty jurisdiction in all tort actions.

Justice Stewart frequently cited Professor Moore's scholarly treatise on admiralty for reasons to support the additional requirement of establishing a significant relationship with maritime commerce. The reasons for this requirement were explained in *Executive Jet*, and more specifically in the following passage from Professor Moore:

> "The only valid criterion of the admiralty jurisdiction is the relation of the matter — whether it be tortious or contractual in nature — to *maritime commerce* . . . Location is often irrelevant. What is relevant and does justify the continued existence of separate maritime laws and procedures are the practical realities of the situation and the overriding goal of perpetuating the vitally important maritime industry. The maritime industry is still, to a large extent, transient, far-flung and fraught with perils. Those dealing with that industry — whether furnishing supplies, services, or shipping goods — are, consequently, entitled to remedies and defenses peculiarly fitted to

such ventures and should not be subjected to the idiosyncrasies of each port's local law. Similarly, because of the perils of the industry, those employed to man and operate vessels and who are injured as a result thereof are entitled to special and uniform laws especially designed to cover such occurrences. Such laws, not only assure the availability of a reasonably fair remedy to those connected or dealing with the maritime industry no matter where the injury or dispute may arise, but also give to all concerned — merchant, seaman and vessel owner — the ability to know in advance of the undertaking the rights and liabilities that will apply should some breach or disaster occur." 7A J. Moore, *Federal Practice, Admiralty*, ¶ .325(5), pp. 3606-3607 (2d Ed. 1976).

It becomes apparent that the law of admiralty is specially designed for the shipping industry, not small pleasure boats. Professor Black, also cited in *Executive Jet*, pointed out that the mention of the "admiralty and maritime jurisdiction" in Article III of the Constitution demonstrated "a strong federal interest in the orderly and uniform judicial governance of the concerns of the maritime industry." Black, *Admiralty Jurisdiction: Critique and Suggestions*, 50 Co. L.Rev. 259, 262 (1950). After a stinging criticism of the strict liability rule, Professor Black proposed that actions for tortious injury should be subject to the admiralty jurisdiction only when the

criterion of "real and substantial relation to shipping is met." Other scholars have joined in this analysis.

Professors Gilmore and Black state the following in their treatise: "If there is any sense at all in having a separate basis for admiralty jurisdiction in the federal courts, it must be because there is a federal interest that can best be implemented by thus dealing with the major concerns of the *shipping industry . . .*" *The Law of Admiralty*, Second Edition, pp. 27-28.

As the trial judge aptly stated in his opinion set forth at 470 F.Supp. 699, 703:

> "Admiralty jurisdiction was created to serve the commercial shipping industry's interests by providing a stable and constant body of law which is to be used in the resolution of litigation arising between those people actually engaged in it. The tremendous increase in the number of small pleasure boats, whether for skiing or pleasure fishing, is a contemporary problem. When the owners of these watercraft have absolutely no commercial or traditional maritime interest which requires the protection of the admiralty side of the federal judiciary, then admiralty jurisdiction should be withheld. In this context Professor Stoltz feels that the operation of small pleasure craft is so 'local' is nature that a uniform body of law is a detriment and that in-

stead, the jurisdiction of these cases should be transferred to the states. Professor Stoltz stated:

> '. . . where commerce stops, the need for uniformity also ends. If commerce is not involved, there is no national interest in uniformity and there is every reason associated with federalism for local power to govern events locally that have only local impact.' (*Pleasure Boating and Admiralty: Erie at Sea*, 51 Cal. L.R. p. 661)

Once again we see another commentator agreeing that when there is a complete lack of any commercial or traditional maritime connection, as in the case at bar, then admiralty jurisdiction should be withheld." Appendix "B" at pp. 18a-19a.

The great increase in the ownership and use of small pleasure craft is a modern phenomenon. Save for those in charter service, their owners and operators have no commercial interest to protect. Ships in foreign commerce or in the coastal trade move regularly from country to country or from state to state, but pleasure craft generally have a much narrower range. Those operated on lakes and waterways forming state boundaries may cross these boundaries with frequency, but many others will never be operated outside the state in which the owner resides. Their interstate contact, for

the average pleasure craft, is not likely to be greater than that of the average privately owned automobile.

If there be a continuing need for a relatively uniform body of laws for the governance of the commercial shipping industry, there is no such apparent need for the regulation of the operation of private pleasure craft aside from the Rules of the Road, laws and regulations relating to lights and the provision and maintenance of lifesaving equipment and similar matters. The Congress, by statute, and the Coast Guard, by regulation, can provide all of the uniform rules needed for the operation of small pleasure craft, but those can be interpreted and enforced by state courts as well as by federal judges. (The ability of state courts to handle pleasure craft litigation is more fully set forth in the third reason for granting the writ.)

Indeed Professor Stoltz views the operation of small pleasure craft as being so local in nature that a uniform body of laws is a positive detriment and that recognition of state court jurisdiction over these cases would be generously advantageous. 51 Cal. L.Rev. 666 et seq.

Three Circuit Court decisions, although admittedly only dealing with limiting the concept of "navigability" in admiralty to waters presently capable of sustaining commercial shipping, set forth additional reasoning that supports granting the writ of certiorari to consider a denial of jurisdiction in this case. The Eighth Circuit

in *Livingston v. United States*, 627 F.2d 165, 169 (8th Cir. 1980) stated that:

> "Federal admiralty jurisdiction had its genesis in the felt need to provide a uniform body of law governing navigation and commercial maritime activity. Admiralty law as a consequence, is concerned almost exclusively with the special needs of the shipping industry."

As the *Livingston* court noted, both the Ninth and Seventh Circuits had reached the same conclusion. In *Adams v. Montana Power Co.*, 528 F.2d 437, 439 (9th Cir. 1975) the Court observed that, absent some present or potential commercial activity, there is no ascertainable federal interest that justifies frustrating the legitimate interests of the states in providing a forum and applying their law to regulate conduct within their borders. In *Chapman v. United States*, 575 F.2d 147 (7th Cir. (en banc), cert. denied, 439 U.S. 893, 99 S.Ct. 251, 58 L.Ed.2d 239 (1978), the Court expressly adopted the reasoning in *Adams*, holding that federal admiralty jurisdiction did not encompass a claim brought by the estate of a man who drowned in a river last used for commercial shipping in 1931.

As the majority in the Circuit Court panel decision of this case pointed out, in Footnote 10 of the *Chapman* decision, that Court said:

> "The reach of admiralty jurisdiction over pleasure boat mishaps occurring in navigable waters used for commercial activity is, of course, not before us." 575 F.2d at 150, n. 10.

However, this note only serves to emphasize the necessity of reviewing this case for two particular reasons.

First, as Justice Thornberry concluded in his dissenting opinion to the Circuit Court's panel decision, in light of the *Chapman* and *Adams* decisions, this case should *at least* be remanded for a finding on whether the stretch of the Amite River where the accident occurred functioned as an artery of commerce. The majority of the panel found it unnecessary to answer this question, even though it could well be determinative of the jurisdictional issue in this case. Furthermore, the majority even recognized that the Amite River where the accident occurred was seldom, *if ever*, used for commercial activity. (641 F.2d 314, 317 in Appendix "A" at p. 7a.)

Second, as the next argument sets forth, the jurisdictional issue presented by the facts of this case poses an important question of federal law which has not been, but should be, clearly answered by this Court. Furthermore, by refusing to deny jurisdiction in this case, the Fifth Circuit has extended the scope of admiralty jurisdiction beyond that previously set forth by that Circuit in the case of *Kelly v. Smith*, 485 F.2d 520 (5th Cir. 1973). The advisability of such an extension from

precedent constitutes an additional issue that should be settled by this Court by writ of Certiorari.

II.

A Decision By This Court Is Necessary To Clearly Settle The Question Of Whether The Admiralty Jurisdiction Of The Federal Courts Should Be Extended To Accidents Occurring Between Purely Recreational Boats With No Commercial Connections.

As outlined in the first reason, a strong case exists for the denial of admiralty jurisdiction in controversies such as this one arising out of the operation of small pleasure craft where no commercial activity is involved. However, even though some lower courts have recognized the convincing argument supporting such a restriction on the admiralty jurisdiction, these courts have continued to extend jurisdiction over pleasure boat cases based on implications from and assumptions about the *Executive Jet* case, supra, this Court's most recent decision touching on the issue. *Richards v. Blake Builders Supply, Inc.*, 528 F.2d 745, 748 (4th Cir. 1975).

The lower courts have relied on three early cases prior to *Executive Jet* for this Court's latest opinion on the pleasure boat issue. In *Levinson v. Deupree*, 345 U.S. 648, 97 L.Ed. 1319, 73 S.Ct. 914, a wrongful death action arising out of a collision of two motor boats on the Ohio River was treated as being in admiralty. There was no discussion of the question of whether the admiralty

jurisdiction extended to the controversy. The answer was assumed to be resolved. Even if this case could be considered to have resolved the pleasure boat issue, it is easily distinguishable from the case at bar, since the Amite River is certainly not a commercial artery like the Ohio River.

In *Just v. Chambers*, 312 U.S. 383, 85 L.Ed. 903, 61 S.Ct. 687, and *Coryell v. Phipps (The Seminole)*, 317 U.S. 406, 63 S.Ct. 291, 87 L.Ed. 363, this Court dealt with limitation of liability proceedings by owners of pleasure boats. In *Just*, the claim was denied because the fault was within the privity or knowledge of the owner. In *Coryell*, it was allowed. In neither case did this Court analyze or discuss the jurisdictional issue; the Court's attention was simply focused upon the application of the limitation of liability rule. Furthermore, in the *Coryell* case, the Seminole (boat) had been engaged in commerce, subject to charter. 39 F.Supp. 142. In the case at bar, the trial judge found as undisputed fact that neither of the boats involved had any connection to commerce, nor were they under charter. 470 F.Supp. 699, 700, in Appendix "B" at pp. 9a-11a.

Thus, even if *Executive Jet* did not question the holdings of any of these three earlier cases, none of these cases clearly settles the jurisdictional question in this case. A forthright analysis of the pleasure boat problem is necessary for two reasons. First, the lower courts should not be forced to rely on mere implications from

old decisions. A conclusive opinion reached after a careful analysis of the jurisdictional issues and ramifications would be much better authority for the lower courts to follow in making important case decisions. Second, as indicated in the first section of argument, several noted authorities agree that admiralty jurisdiction should not be extended over pleasure boat cases with no connection to the commercial shipping industry.

For these reasons, and also as indicated in this Court's Rule 17.1(c), the writ of certiorari should be granted to settle this important jurisdictional question. The advisability of granting the writ is further emphasized by the potential impact of the Fifth Circuit's decision in this case.

In *Kelly v. Smith*, 485 F.2d 520 (5th Cir. 1973), the Fifth Circuit preserved a link between admiralty jurisdiction and commercial activity which its decision in this case would completely sever. In *Kelly*, the Fifth Circuit also recognized the absurdity of applying the "strict locality test," and stated:

> "The analysis and thrust of *Executive Jet*, coupled with our decision in Peytavin, dictate the conclusions that maritime locality alone is no longer sufficient to sustain maritime jurisdiction, and that the wrong must bear a significant relationship to maritime activity." 485 F.2d at 524.

In this case, the panel majority "regretfully concluded" that precedent did not permit them to take the "far reaching step" of denying admiralty jurisdiction in this case. The panel also stated that the *Kelly* decision, among others, "unquestionably" controlled their decision in this case. (641 F.2d 314, 315, in Appendix "A" at pp. 2a & 3a.) However, a careful analysis of the *Kelly* decision indicates that it was actually the panel who was taking a "far-reaching step" from precedent by reversing the district court's decision.

The Circuit Court in *Kelly* stated that it must "look to all the circumstances for a substantial maritime relationship. Both *Peytavin* and *Executive Jet* offer guidelines for the determination." (485 F.2d at 525) The Court then went on to list certain factors in *Kelly* which caused it to invoke admiralty jurisdiction: "The functions and roles of the parties; the types of vehicles and instrumentalities involved; the causation and the type of injury; and traditional concepts of the role of admiralty law." (Id.) With this analysis, the Court concluded that "policy militates toward admiralty jurisdiction in this case." (Id.)

As the District Court Judge observed, it is not clear how much of the "policy" involved in *Kelly* dealt with the fact that the plaintiffs would have been barred due to the running of the applicable state prescriptive period as opposed to the doctrine of laches used in admiralty. However, it did play some part. (470 F.Supp. at p. 702, in Appendix "B" at p. 17a). The prescription versus laches argument is not present in the instant case

since suit was filed well before one year elapsed from the date of the accident.

In support of this petition, it is important to note that the *Kelly* decision preserved a link with commercial activity that the lower court decision in this case would completely sever. The discussion in the *Kelly* case indicated that there was at least some commercial activity present to invoke admiralty jurisdiction. The case dealt with what might be termed a "piracy" on the Mississippi River. The Circuit Court justified its decision in *Kelly* as follows:

> "Rifle fire directed at a vessel, albeit a small one, *on a major commercial artery*, and injuring the pilot, presents sufficient danger to *maritime commerce* for the federal courts of admiralty to assume jurisdiction and to furnish remedies to those aboard the vessel and injured by that conduct." 485 F.2d at 526 (emphasis added)

There is no indication in this case that the incident in question created any such "danger to maritime commerce" and thus no federal interest is at stake in this case. Furthermore, the accident did not occur on a commercial artery.

The lower court contends that its decision to extend jurisdiction to the facts of this case would promote uniformity. As already outlined above, in this case where no maritime commercial activity is involved, these is no

need for a uniform body of federal law to regulate the disputes of pleasure boaters. *Admiralty: Erie at Sea*, 51 Ca. L.R. p. 661.

In any event, if uniformity is the goal, the best way to achieve it is for this Court to grant the writ of certiorari and take this opportunity to establish a clear-cut uniform rule to deal with pleasure boat cases. As indicated above, this Court has never issued an analysis of this jurisdictional issue. Despite the absence of a definite ruling by this Court, the lower courts have continued to rely on mere implications and assumptions in rejecting the well reasoned arguments in favor of not extending admiralty jurisdiction to these cases. Before these arguments are rejected, they should first be presented to this Court for its consideration.

We suggest that a review of all the post *Executive Jet* cases cited clearly establishes a simple workable rule for determining the applicability of maritime jurisdiction in pleasure boating cases. The test of jurisdiction dictates a balancing of location with commercial nexus. As one approaches the shore and moves inland, the complained of conduct must have a closer connexity with maritime commerce in order to support admiralty jurisdiction. Viewed in this light, every case, including *Kelly v. Smith*, fits into an orderly pattern. As location becomes less relevant to maritime commerce, the activity complained of must have a closer relationship to such commerce. (Commercial) Conduct + (Commercial) Location = Admiralty Jurisdiction.

Even if this test were found to be nebulous, the test applied by the District Court in this case would provide a viable alternative. The District Court said that when a court considers whether or not to extend admiralty jurisdiction to a case involving purely pleasure crafts, the following guidelines would aid in determining the jurisdictional question:

> (1) Was the boat(s) involved being used for a purely pleasure type operation;
>
> (2) Has the boat(s) involved ever been previously used in any type of commercial or maritime operation;
>
> (3) Was the driver of the boat(s) under hire;
>
> (4) Were any of the passengers under hire to perform any traditional maritime function;
>
> (5) Was there any instrumentality of commercial or maritime connection involved in any way with the accident;
>
> (6) Are there any policy considerations involved which should encourage the court to find in favor of admiralty jurisdiction; and/or
>
> (7) Are there any traditional concepts or modern applications of the role of admiralty which could be involved that would invoke admiralty jurisdiction.

(470 F.Supp. 699, 704, in Appendix "B" at pp. 20a-21a.)

The District Court acknowledged that had any one of these questions been answered affirmatively in the case at bar, then that fact, coupled with the location of the accident, might have been sufficient to invoke the admiralty jurisdiction of the Federal Court. However, in this case, all the answers to the listed questions were in the negative (except for #(1), of course).

Regardless of the form chosen, there is an obvious need for a definite jurisdictional test in pleasure boat cases. For this reason, a decision by the Court on writ of certiorari is necessary to clearly settle the question of whether the admiralty jurisdiction of the federal courts should be extended to accidents occurring between purely recreational boats with no commercial connections.

III.

There Is An Adequate Body Of State Law Available To Resolve Controversies Such As This In The State Courts, Without Burdening The Federal Courts.

The states are capable of resolving litigation arising from the collision of two pleasure boats out of their existing bodies of laws. The lower court believed that admiralty jurisdiction should be invoked merely because the federal rules of the road were involved in this dispute. However, while the federal rules of the road must be applicable to the operation of small pleasure craft in

navigable waters, there is no impediment to the application of those requirements by the state courts. *Crosson v. Vance*, 484 F.2d 840, 841 (4th Cir. 1973); *Richards v. Blake Builders Supply, Inc.*, 528 F.2d 745, 747 (4th Cir. 1975).

State courts are not only allowed but are mandated to enforce federal statutes relating to navigation and are to give those rules the same construction as they are given by the federal courts sitting in admiralty. *Carlin v. New York N.H. & H.R. Co.*, 1911, 130 N.Y.S. 828; *Chesley v. Nantasket Beach Steamboat Co.*, 1901, 61 N.E. 50, 179 Mass. 469; 33 U.S.C.A. §154.

The lower court majority recognized that the record in this case indicated that the Amite River, where the collision occurred, was seldom *if ever* used for commercial activity. (641 F.2d 314, 316, in Appendix "A" at p. 6a). As previously mentioned, the Ninth Circuit in *Adams v. Montana Power Co.*, 528 F.2d 437 (9th Cir. 1975) held that admiralty jurisdiction did not extend to a tort claim arising in waters "traversed" by small pleasure craft only, "where no commercial shipping occurred or was likely to occur." The court also found that application of federal law on waters devoid of trade and commerce would only serve to burden the federal courts and frustrate the purpose of state tort law. This reasoning was adopted by both the Seventh and Eighth Circuits in the *Chapman* and *Livingston* cases cited above.

If the lower court's decision is maintained, the penumbra of this decision would only serve to interject admiralty law complexities into litigation easily resolved by existing, often more modern state laws. Pleasure boat collisions without any commercial connection would then involve such notions as major-minor fault, active/passive negligence, divided damages in collision, and limitation proceedings. For this reason, review by this Court is advisable before the interjection of these complexities is allowed. The complexity can be avoided since state laws provide adequate remedies and procedures for settlement of disputes like this one, arising from local, intra-state, small boat accidents that have no connection with the maritime industry.

CONCLUSION

Since this case involves two pleasure boats without any connection to maritime commerce, the admiralty jurisdiction of the federal court should not be invoked. The lower court reversed the district court's judgment and found jurisdiction over this controversy despite the well reasoned arguments for not extending admiralty jurisdiction to such disputes. The only "authority" for this extension was assumed and implied from this Court's decision in *Executive Jet* and three earlier cases distinguished from the facts of this case. Since none of these cases clearly analyzed or disposed of the important jurisdictional question presented in this case, pursuant to this Court's Rule 17.1(c) this petition for writ of certiorari should be granted, the deci-

sion of the lower court reversed, and the judgment of the trial court reinstated, dismissing this case for lack of jurisdiction.

Respectfully submitted,

ARTHUR HOWELL ANDREWS
Attorneh of Record
FRANKLIN, MOORE & WALSH
501 Louisiana Avenue
Post Office Box 3958
Baton Rouge, Louisiana 70821
(504) 383-2608

CERTIFICATE OF SERVICE

I hereby certify that three true and correct copies of the foregoing Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit have been served on the Honorable Roy Maughan, counsel of record for respondents, Pansy F. Richardson, Donald B. Richardson, Patrick S. Richardson, Joseph S. Richardson, Larry S. Richardson, and Carla Richardson and on the Honorable Victor Marcello, counsel of record for June G. Allen by depositing said copies in the U.S. mail, postage prepaid, this ____day of June, 1981.

I further certify that all parties required to be served have been served.

ARTHUR H. ANDREWS

APPENDIX "A"

Pansy F. RICHARDSON, Donald B. Richardson, Patrick S. Richardson, Joseph S. Richardson, Larry S. Richardson, and Carla Richardson, Plaintiffs-Appellants-Cross Appellees,

v.

FOREMOST INSURANCE COMPANY, Shirley Eliser and June G. Allen, Defendants-Appellees,

June G. Allen, Defendant-Appellee-Cross Appellant.

No. 79-2542.

United States Court of Appeals, Fifth Circuit.

April 2, 1981.

Appeals from the United States District Court for the Middle District of Louisiana.

Before THORNBERRY, ANDERSON and THOMAS A. CLARK, Circuit Judges.

THOMAS A. CLARK, Circuit Judge:

This is an appeal from the dismissal of plaintiffs' complaint on the ground that it did not state a cause of

action that was within the admiralty jurisdiction of the lower court. The incident giving rise to the complaint involved a collision between two pleasure boats on the upper reaches of the Amite River. The district court, 470 F.Supp. 699, reasoned that the facts of the case did not present a sufficient relationship to traditional maritime activity to warrant the extension of admiralty jurisdiction to this litigation. While there is much logic and good sound policy reasons that support the district court's holding, we regretfully conclude that precedent does not permit us to take this far-reaching step. Additionally, there is uniformity in the present rule that admiralty jurisdiction extends to all accidents occurring between surface vessels on navigable waters. The benefits derived from this certainty override the policy considerations advanced by the appellees in support of the district court's ruling.

The accident giving rise to this litigation was between one pleasure boat being used to pull a skier on a "zip sled" and a pleasure boat used for sportfishing but under way at the time. Neither boat had ever been involved in commercial maritime activity. There was no involvement at the time of the accident of any buoy, barge, or underwater obstruction.

The district court concluded that there was a lack of admiralty jurisdiction and defined the issue as follows:

> In short, this case squarely presents the factual issue of whether or not "admiralty

jurisdiction" must be extended to an accident occurring between two pleasure boats in the purest sense of the word, and in which there is absolutely no "commercial" or "traditional maritime activity" whatsoever involved.

The district court referred to the views of certain text writers in the field[1] and then examined and relied on three cases that unquestionably control the decision of this case, those being *Executive Jet Aviation, Inc. v. City of Cleveland, Ohio*, 409 U.S. 249, 93 S.Ct. 493, 34 L.Ed.2d 454 (1972), *Kelly v. Smith*, 485 F.2d 520 (5th Cir. 1973), and *Peytavin v. Government Employees Insurance Co.*, 453 F.2d 1121 (5th Cir. 1972).

Those three cases very simply may be said to hold that admiralty jurisdiction requires more than the occurrence of the tort on navigable waters — that additionally there must be a significant relationship between the wrong and traditional maritime activity. Thus, we agree with the district court in the statement of the rule. We differ from the district court in the application of the rule to the facts in this case.

We hold that two boats, regardless of their intended use, purpose, size, and activity, are engaged in traditional maritime activity when a collision between them occurs on navigable waters. We say this because

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1 Gilmore and Black, *The Law of Admiralty*, 2d ed., 1975; Benedict on Admiralty, 7th ed. (Revised); and, Boland and Dodd, *Recent Developments in the Law of Maritime Torts* (1972).

boats, regardless of their size, purpose, and activity, are governed by the same "Rules of the Road" as the largest seagoing vessel when those boats are traversing navigable waters. As such, the owners and operators of the vessels are bound by those rules, and their negligent operation or absence of negligent operation is so governed. We do not find that any of the three cases which are our guideposts require that the maritime activity be an exclusively commercial one. We sympathize with those writers and scholars who strongly believe that admiralty jurisdiction should be limited to only litigation involving commercial activity on navigable waters. We recognize that the Fourth Circuit in *Crosson v. Vance*, 484 F.2d 840 (4th Cir. 1973), holds otherwise than we do here. We note that the Eighth Circuit in *St. Hilaire Moye v. Henderson*, 496 F.2d 973 (8th Cir. 1974), has held that admiralty jurisdiction does extend to an accident identical to this. The Seventh Circuit in *Chapman v. United States*, 575 F.2d 147 (7th Cir. 1978), held that admiralty jurisdiction did not extend in that case because the once navigable waterway is now used only for recreational activities. In footnote 10 the court said: "The reach of admiralty jurisdiction over pleasure boat mishaps occurring in navigable waters used for commercial activity is, of course, not before us." 575 F.2d at 150, n. 10.

Our decision in this case is strongly influenced by the holding in *Kelly v. Smith, supra*, in which this court stated that "[a]dmiralty has traditionally been concerned with furnishing remedies for those injured while

traveling navigable waters." *Id.* at 526. That case dealt with an unusual factual situation where gunfire was exchanged between occupants of a pleasure boat on the Mississippi River and persons standing on an island. The court placed emphasis on the danger presented by gunfire being directed at a vessel, although a small one, on a major commercial artery. We note a strong dissent in that case by Judge Morgan but believe that the facts in this case are more closely related to traditional maritime activities than those in the *Kelly* case because the rules governing navigation of all vessels govern the operation of the boats involved in the collision in this case.

If we were to hold that admiralty jurisdiction did not reach this litigation, we would be injecting an uncertainty that would plague litigants and the courts. For example, in the case of non-commercial navigators traveling on navigable waters that are shared by more than one state, their obligations and duties would be subject to differing standards depending on their precise location within the territorial jurisdiction of one state or another. Moreover, non-commercial navigators everywhere would be subject to yet another conflict in applicable standards of behavior depending upon whether their activity later turns out to be sufficiently "commercial," and, therefore, solely a matter for the states. Only a uniform admiralty law, extending to non-commercial as well as commercial navigators, avoids these problems.

We note additionally from the record that the place where the accident occurred is seldom, if ever, used for commercial activity. That does not cause us to vary from our holding. The waterway is not landlocked. It would be introducing another note of uncertainty to hold that admiralty jurisdiction extends only to a stretch of navigable water that presently functions as a commercial artery. Jurisdiction should be a readily ascertainable as courts can make it. If the waterway is capable of being used in commerce, that is a sufficient threshold to invoke admiralty jurisdiction.

We remand to the district court for consideration of the case on the merits..

REVERSED and REMANDED.

THORNBERRY, Circuit Judge, concurring in part; dissenting in part:

Admiralty jurisdiction does not encompass actions in tort unless the wrong occurs on navigable waters and bears a significant relationship to traditional maritime activity. *Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249, 93 S.Ct. 493, 34 L.Ed.2d 454 (1972); *Kelly v. Smith*, 485 F.2d 520 (5th Cir. 1973). The district court in this instance found it unnecessary to reach the navigability issue, since it found the "traditional maritime activity" criterion dispositive of the case. Although I am sympathetic with that court's conclusion that pleasure boating is not the stuff of which ad-

miralty jurisdiction should be made, the question is no longer open for us to decide, since this Court has held that noncommercial activity does fall within the ambit of admiralty jurisdiction. *Kelly, supra.*

It is important to note, however, that the *Kelly* decision preserved a link (though certainly a weak one) with commercial activity that the majority in this case severs completely. The Court justified its decision in *Kelly* as follows:

> Rifle fire directed at a vessel, albeit a small one, *on a major commercial artery,* and injuring the pilot, presents sufficient danger *to maritime commerce* for the federal courts of admiralty to assume jurisdiction and to furnish remedies to those aboard the vessel and injured by that conduct.

Id. at 526 (emphasis added). In contrast, there is no hint in the case before us that the tort created a similar "danger to maritime commerce" and thus no trace of *any* federal interest at stake in this case. Because I believe that the desire for certainty cannot alone justify the assumption of federal control over matters of purely local concern, I would remand for a finding on whether the stretch of river where the accident occurred functions as an artery of commerce. *See Chapman v. United States,* 575 F.2d 147, 151 (7th Cir. 1978) (en banc); *Adams v. Montana Power Co.,* 528 F.2d 437 (9th Cir. 1975). Since the majority finds it unnecessary to answer this question, I respectfully dissent.

APPENDIX "B"

Pansy F. RICHARDSON, Donald B. Richardson, Patrick S. Richardson, Joseph S. Richardson, Larry S. Richardson, and Carla Richardson

v.

FOREMOST INSURANCE COMPANY, Shirley Eliser and June G. Allen.

Civ. A. No. 76-280.

United States District Court, M.D. Louisiana.

May 23, 1979.

E. GORDON WEST, District Judge:

The sole issue before the court is whether or not, under the admitted facts in this case, this court is vested with "admiralty jurisdiction." The incident giving rise to this litigation involved a collision between two "pleasure" boats. One was an eighteen foot pleasure boat powered by a 185 h.p. Johnson outboard motor that was being used for water skiing purposes at the time of the accident. The other was a sixteen foot "bass boat" powered by an outboard motor that was used exclusively for pleasure fishing. At the time of the accident the two boats were headed in opposite directions on the Amite River. The point of impact was in a curve

some one-half to three-quarters of a mile downstream from the French Settlement bridge. The bass boat was proceeding northward and apparently made a left turn into the path of the southbound ski boat.

Assuming, for the purpose of this opinion, that the Amite River, at the point of collision, is "navigable", the dispositive issue, in this case, is whether or not there is a "sufficient relationship to traditional maritime activity" to warrant the extension of admiralty jurisdiction to this litigation.

For the reasons hereinafter set forth, we conclude that under the facts of this case this court is not vested with admiralty jurisdiction.

The following facts are undisputed:

(1) One boat was used for pleasure boating, such as boat riding and water skiing, and at the time of the accident the boat was actually pulling a skier on a zip sled;

(2) The other boat was used exclusively for pleasure fishing and was described as a bass boat;

(3) Neither boat had ever been used in an "commercial maritime activity" before the accident;

(4) At the time of the accident neither boat was involved in any "commercial maritime activity" of any sort;

(5) Neither of the two drivers of the boat were being paid to operate the boat nor was this activity in any way a part of their regular type of employment;

(6) None of the passengers on either boat were engaged in any kind of "traditional maritime activity" either before or at the time of the accident;

(7) Neither of the boats involved were under hire in any traditional maritime form;

(8) There is no evidence to indicate that any "commercial activity", even in the broadest admiralty sense, had ever been previously engaged in by either of the boats in question, and in fact the two boats would have to be classified as "purely pleasure craft", not in any way "involved in commerce"; and,

(9) There was no other instrumentality involved in this accident that had even a minor relationship to "admiralty" or "commerce", i.e. a buoy, barge, oil drilling apparatus, etc.

In short, this case squarely presents the factual issue of whether or not "admiralty jurisdiction" must be extended to an accident occurring between two pleasure boats in the purest sense of the word, and in which there is absolutely no "commercial" or "traditional maritime activity" whatsoever involved.

In our analysis it must first be noted that some of the most respected admiralty commentators lean heavily toward the stand now taken by this court that this particular case is not one which was meant to be covered by the admiralty jurisdiction of the federal courts.

Professors Gilmore and Black state the following in their treatise, *The Law of Admiralty*, Second Edition:

> "The following are doubtful areas, (for invoking admiralty jurisdiction) where generalization is dangerous:
>
> > Torts occurring on navigable waters, but having no other maritime connection." (*The Law of Admiralty*, Second Edition, pp. 27, 28; parenthesis added)

However, Professors Gilmore and Black do not stop here. Their treatise contains numerous quotes aimed at the very heart of this case at bar; such as:

> "In the main, the outlines of the jurisdiction seem to have been pretty well drawn. Its evaluation requires the balancing of two fac-

tors pulling in opposite directions. First, if there is any sense at all in having a separate basis for admiralty jurisdiction in the federal courts, it must be because there is a federal interest that can best be implemented by thus dealing with the major concerns of the *shipping industry* — with all of them, and not just with a few of them selected on antiquarian criteria."

"Whether a given inclusion within or exclusion from the jurisdiction is warranted must depend on the general sense and policy of having the jurisdiction at all. It is hard to think of any better reason for having this jurisdiction than its aptness for providing a special-industry court for the *maritime industry*. If this is right, then some modern decisions wander far off the mark. One thinks of the cases bringing airplane accidents within the jurisdiction, just because the plane happens to crash on navigable waters, and the inclusion of such mishaps as surfboard accidents, or *motorboat accidents* on lakes substantially landlocked. *Happily, these cases have* (to some not yet certain extent) *been overruled, at the highest level. It may be hoped that this overruling is thoroughly general . . . Ideally, the jurisdiction out* (sic) *to include those and only those things principally connected with maritime transportation. Summarily, the lower courts have been over-inclusive as to torts,* and under-inclusive as to

contracts." (*The Law of Admiralty*, Second Edition, pp. 29-31; emphasis added)

Benedict on Admiralty, Seventh Edition (Revised), is another important treatise in which several selected quotes would strongly indicate that the particular facts in this case do not merit the extension of admiralty jurisdiction:

> ". . . maritime law is not a monistic system. Where, although a matter is maritime, there may be overwhelming considerations requiring state regulation and if such state law does not disturb the general uniformity of maritime law, its application to cases 'maritime but local' will be valid. It is not always easy in borderline cases to determine how the accommodation between state and federal concern should be made. One distinction appears to be that where obligations are imposed by virtue of the authority of state or Federal government, the court must attempt to balance the interests, but where the obligations are assumed voluntarily, as in a contract, they ought to be judged by the law applying to the real nature of the transaction." (*Benedict on Admiralty*, Seventh Edition (Revised) Section 127, pp. 8-47 thru 8-49)

Louisiana, with its roots sunk deeply into the maritime arena, has been one of the leading states in

the molding and shaping of the constraints of admiralty jurisdiction. In a recently published book on this subject several noted Louisiana attorneys spoke about the factual situation which now presents itself to this court:

> "The second constructive reduction of the admiralty jurisdiction is the *requirement of a maritime connection along with the locus of the accident to support maritime jurisdiction. . . .* The court mentioned that in the Fifth Circuit's decision in *Watts v. Zapata Offshore Co.*, it had been said that only minimal maritime connection was required once you had the sufficient maritime locus.
>
> "What, then, were the considerations of whether there was sufficient maritime connection for this accident? The *Prytarin* court, in finding there was not sufficient maritime connection in that case pointed out that neither the parties, nor the nature, nor the apparent cause of the accident, nor the injury sustained demonstrated any further connection with maritime interests. It is necessary to keep in mind what considerations are involved in the determination of "maritime connections."
>
> "As a result, *now not only do you have to have the locus, you need the pure maritime connection for admiralty jurisdiction.*

> "The district courts are going to have a struggle too, because it would appear that they must now come to grips with something previously unheard of: *maritime connexity as an adjunct to the locus theory.*" (Recent Development in the Law of Maritime Torts, edited by Boland and Dodd; pp. 22-26 (1972))

The foregoing analysis leads us directly to two cases which must be closely examined by this court. *Executive Jet Aviation, Inc. v. City of Cleveland, Ohio*, 409 U.S. 249, 93 S.Ct. 493, 34 L.Ed.2d 454, 1973 AMC 1 (1972); and *Kelly v. Smith*, 485 F.2d 520, 1973 AMC 2478 (CA 5-1973).

In *Executive Jet* the United States Supreme Court recognized the time honored rule that the "locality" of the wrong was traditionally the deciding point in whether or not admiralty jurisdiction was present. However, in an in-depth review of prior jurisprudence the court recalled some serious difficulties with the blind application of the locality test. Based on this the court stated:

> "In sum, there has existed over the years a judicial, legislative, and scholarly recognition that, in determining whether there is admiralty jurisdiction over a particular tort or class of torts, reliance on the relationship of the wrong to traditional maritime activity is often more sensible and more consonant with the purposes of maritime law than is a purely

mechanical application of the locality test." (93 S.Ct. at 501)

Of course, *Executive Jet* dealt with an aircraft accident. This is not the situation in the case at bar. However, the principles of *Executive Jet*, and more importantly its progeny, will have an impact on this case.

Likewise, in *Kelly v. Smith*, supra, the Fifth Circuit recognized the absurdity of applying the "strict locality test", and stated:

> "The analysis and thrust of *Executive Jet*, coupled with our decision in *Peytavin*, dictate the conclusions that maritime locality alone is no longer sufficient to sustain maritime jurisdiction, and that the wrong must bear a significant relationship to maritime activity." (485 F.2d at 524)

The court in *Kelly* was steadfast in adhering to a policy whereby some significant relationship to a recognized maritime activity was required before admiralty jurisdiction would be invoked. (see generally 485 F.2d at 524).

With these two cases as a backdrop, our examination continues with the "locality plus" test that was discussed in *Kelly v. Smith*, supra. The court in *Kelly* stated that it must "look to all the circumstances for a substantial maritime relationship. Both *Peytavin* and *Executive Jet*

offer guidelines for the determination." (485 F.2d at 525) The court then went on to list certain factors in that case which caused it to invoke the admiralty jurisdiction:

> "From the facts and analysis of *Executive Jet* and *Peytavin* we can discern factors to be considered in the circumstances before us: the functions and roles of the parties; the types of vehicles and instrumentalities involved; the causation and the type of injury; and traditional concepts of the role of admiralty law." (485 F.2d at 525)

The Fifth Circuit concluded its analysis with the statement that: "Policy militates toward admiralty jurisdiction in this case." (485 F.2d at 526) It is not clear how much of the "policy" involved dealt with the fact that the plaintiffs in *Kelly* would have been barred due to the applicable state prescriptive period as opposed to the doctrine of laches used in admiralty. However, it did play some part. (see generally 485 F.2d at 526) The prescription versus laches argument is not present in the instant case since suit was filed well before one year elapsed from the date of the accident.

Most importantly to this case, the discussion in the *Kelly* case indicated that there was either some "commercial activity" or some "traditional maritime connection" present to invoke admiralty jurisdiction. It seems clear from the facts in *Kelly* that the case dealt, at least to some degree, with what this court might term

"piracy" in that the plaintiffs were admittedly poaching on the land which the defendant, J. C. Smith, had been hired to protect.

When the location of the injury is on or in a navigable waterway, the requirement of a "traditional maritime connection" becomes less stringent. In *Kelly v. Smith*, supra, the poaching or piracy, with its commensurate miniwar between the parties in a stretch of the Mississippi River which is conclusively navigable, was enough to trigger the admiralty jurisdiction of the federal court. However, in the case at bar this court can find no "traditional maritime connection" between the injuries received and the location of the tort. Admiralty jurisdiction was created to serve the commercial shipping industry's interests by providing a stable and constant body of law which is to be used in the resolution of litigation arising between those people actually engaged in it. The tremendous increase in the number of small pleasure boats, whether for skiing or pleasure fishing, is a contemporary problem. When the owners of these watercrafts have absolutely no commercial or traditional maritime interests which require the protection of the admiralty side of the federal judiciary, then admiralty jurisdiction should be withheld. In this context Professor Stoltz feels that the operation of small pleasure craft is so "local" in nature that a uniform body of law is a detriment and that instead, the jurisdiction of these cases should be transferred to the states. Professor Stoltz stated:

". . . where commerce stops, the need for uniformity also ends. If commerce is not involved, there is no national interest in uniformity and there is every reason associated with federalism for local power to govern events locally that have only local impact." (*Pleasure Boating and Admiralty: Erie at Sea*, 51 Cal.L.R. p. 661)

Once again we see another commentator agreeing that when there is a complete lack of any "commercial" or "traditional maritime connection", as in the case at bar, then admiralty jurisdiction should be withheld.

This court's decision that, in this particular type of case, there is no admiralty jurisdiction, is further bolstered by several other cases. At first blush each of these other cases might seem to indicate that this court is in error. However, upon a close examination it can be readily determined that in each of the factual situations some quality of "commerce" or "traditional maritime activity" was connected with the accident.

In *Kaiser v. Travelers Insurance Co.*, 359 F.Supp. 90 (E.D. La.-1973), the connection was the fact that the water skier hit a sunken barge. In *Gele v. Chevron Oil Company*, 574 F.2d 243 (CA 5-1978), the connection was that the pleasure boat collided with a sunken barge. And finally, in two cases brought before this court, *Butler v. Amoco Production Company* (CA No. 74-94) and *Langlois v. Dow Chemical Company*, (CA No. 78-402), we have extended

admiralty jurisdiction to cases in which the only connection was that each of the pleasure boats involved struck a pipe anchored to an old drilling rig which was a few inches under the water level in a bayou.

As can be seen from each of these cited cases, there was some "commercial" or "traditional maritime" connection, regardless of how small, which, when coupled with the location of the accident, could properly invoke the admiralty jurisdiction of a federal court. However, in the case at bar no such minimal connection exists and, based on the guidelines of *Peytavin* and *Executive Jet*, admiralty jurisdiction cannot be properly extended, regardless of the location of the accident.

Just as the court in *Kelly v. Smith*, supra, set forth a non-exclusive list of factors to be considered, this court also finds such a listing to be helpful. When a court considers whether or not to extend admiralty jurisdiction to a case involving purely pleasure crafts, the following list offers some guidelines to aid in the admiralty jurisdiction question:

(1) Was the boat(s) involved being used for a purely pleasure type operation;

(2) Has the boat(s) involved ever been previously used in any type of commercial or maritime operation;

(3) Was the driver of the boat(s) under hire;

(4) Were any of the passengers under hire to perform any traditional maritime functions;

(5) Was there any instrumentality of commercial or maritime connection involved in any way with the accident;

(6) Are there any policy considerations involved which should encourage the court to find in favor of admiralty jurisdiction; and/or

(7) Are there any traditional concepts or modern applications of the role of admiralty which could be involved that would invoke admiralty jurisdiction.

The list is merely illustrative of the type of indepth analysis which a court should undertake before deciding whether or not admiralty jurisdiction is present in a particular case involving one or more purely pleasure boats. In the case at bar all of the answers to the aforementioned list are in the negative. Had any one of them been in the affirmative, then that fact, coupled with the location of the tort, might be sufficient to invoke the admiralty jurisdiction of the federal court.

From the Laws of Oleron to *Executive Jet* the role of "admiralty jurisdiction" has undergone many a metamorphosis. It will probably continue to do so. This court finds that one metamorphosis which must be recognized is that when an accident involving one or more vessels occurs on or in a navigable body of water

and involves purely pleasure boats in which there is not the slightest scintilla of either "commercial" activity or "traditional maritime activity" involved, then the admiralty jurisdiction of the federal court should not be invoked.

Therefore, based on the foregoing factual and legal analysis it is the opinion of this court that plaintiff's claim cannot be maintained in admiralty. The plaintiff's suit will be dismissed.

Judgment will be entered accordingly.

APPENDIX "C"

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
UNIT A & B

No. 79-2542

PANSY F. RICHARDSON, DONALD B. RICHARDSON, PATRICK S. RICHARDSON, JOSEPH S. RICHARDSON, LARRY S. RICHARDSON, CARLA RICHARDSON, and JUNE G. ALLEN,
Plaintiffs-Appellants-
Cross Appellees,

versus

FOREMOST INSURANCE COMPANY, SHIRLEY ELISER and JUNE G. ALLEN,
Defendants-Appellee,

JUNE G. ALLEN,
Defendant-Appellee-
Cross Appellant.

Appeals from the United States District Court for the Middle District of Louisiana

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ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

(Opinion April 2, 1981, 5 Cir., 1981, 641 F.2d 314).

(May 4, 1981)

Before THORNBERRY, ANDERSON and THOMAS A. CLARK, Circuit Judges.

PER CURIAM:

The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ THOMAS A. CLARK
United States Circuit Judge

Received: May 6, 1981

CLERK's NOTE:
See Rule 41 FRAP and Local Rule 17 for Stay of the Mandate

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
UNITS A & B

No. 79-2542

PANSY F. RICHARDSON, DONALD B. RICHARDSON, PATRICK S. RICHARDSON, JOSEPH S. RICHARDSON, LARRY S. RICHARDSON, and CARLA RICHARDSON,
Plaintiffs-Appellants-
Cross Appellees,

versus

FOREMOST INSURANCE COMPANY, SHIRLEY ELISER and JUNE G. ALLEN,
Defendants-Appellees,

JUNE G. ALLEN,
Defendant-Appellee-
Cross Appellant.

Appeals from the United States District Court for the Middle District of Louisiana

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ON PETITION FOR REHEARING

(May 4, 1981)

Before THORNBERRY, ANDERSON, and THOMAS A. CLARK, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

/s/ THOMAS A. CLARK
United States Circuit Judge

Received: May 6, 1981

CLERK's NOTE:
See Rule 41 FRAP and Local Rule 17 for Stay of the Mandate

APPENDIX "D"

CONSTITUTIONAL PROVISIONS AND STATUTES

I.

U.S. Constitution, Article III.

Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; — to all Cases affecting Ambassadors, or public Ministers and Consuls; — to all Cases of admiralty and maritime Jurisdiction; — to Controversies to which the United States shall be a Party; — to Controversies between two or more States; — between a State and Citizens of another State; — between Citizens of different States; — between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the Supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the Supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place of Places as the Congress may by Law have directed.

II.

28 U.S.C. §1254. Courts of appeals; certiorari; appeal; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By appeal by a party relying on a State statute held by a court of appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States, but such appeal shall preclude review by writ of certiorari at the instance of such appellant, and the review on appeal shall be restricted to the Federal questions presented;

(3) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions

or require the entire record to be sent up for decision of the entire matter in controversy.

III.

28 U.S.C. §1333. Admiralty, maritime and prize cases

The district courts shall have original jurisdiction, exclusive of the courts of the States, of:

(1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.

(2) Any prize brought into the United States and all proceedings for the condemnation of property taken as prize. June 25, 1948, c. 646, 62 Stat. 931; May 24, 1949, c. 139, §79, 63 Stat. 101.

IV.

33 U.S.C. §154. Adoption of rules for navigation of harbors, rivers and inland waters.

The following regulations for preventing collisions shall be followed by all vessels upon the harbors, rivers, and other inland waters of the United States except the Great Lakes and their connecting and tributary waters as far east as Montreal, and the waters of the Mississippi River between its source and the Huey P. Long Bridge and all of its tributaries emptying thereinto and their tributaries, and that part of the Atchafalaya River

above its junction with the Plaquemine-Morgan City alternate waterway, and the Red River of the North, and are declared special rules duly made by local authority. June 7, 1897, c. 4, §1, 30 Stat. 96; May 21, 1948, C 328, §1, 62 Stat. 249; Aug. 8, 1953, c. 386, §1, 67 Stat. 497.

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No. 80-2134

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

FOREMOST INSURANCE COMPANY and SHIRLEY ELISER,
Petitioners,

versus

PANSY F. RICHARDSON, DONALD B. RICHARDSON, PATRICK S. RICHARDSON, JOSEPH S. RICHARDSON, LARRY S. RICHARDSON, CARLA RICHARDSON and JUNE G. ALLEN,
Respondents.

On Petition for a Writ of Certiorari to The United States Court of Appeals For the Fifth Circuit

SUPPLEMENT TO PETITION FOR CERTIORARI

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July 21, 1981

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No. 80-2134

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On Petition for a Writ of Certiorari to
The United States Court of Appeals
For the Fifth Circuit

SUPPLEMENT TO PETITION FOR CERTIORARI

SUPPLEMENT TO PETITION FOR CERTIORARI

Pursuant to Rule 22.6, the petitioners, Foremost Insurance Company and Shirley Eliser, respectfully submit the following addition to their petition for certiorari. In particular, petitioners call attention to the new Fifth Circuit case of *Solyde Drilling & Marine Co. v. Coastal States Gas Producing Co.*, No. 78-2817 (5th Cir. 5-14-81) in supplementing the argument under their Second Reason for Granting the Writ. (Petition for Certiorari, pp. 15-22).

II. A Decision By This Court Is Necessary To Clearly Settle The Question Of Whether The Admiralty Jurisdiction Of The Federal Courts Should Be Extended To Accidents Occurring Between Purely Recreational Boats With No Commercial Connections.

. . . As previously noted, even though some lower courts have recognized the convincing argument supporting the denial of admiralty jurisdiction over non-commercial pleasure craft accidents, these courts have continued to extend admiralty jurisdiction to such cases because of misplaced reliance on implications from and assumptions about the *Executive Jet* decision. In fact, the lower courts have based their reluctant extension of admiralty jurisdiction to these non-commercial pleasure boat cases on three early decisions by

this Court that were not expressly overruled in *Executive Jet*. As indicated in the original brief, none of these early cases clearly settled the jurisdictional question presented in this action. For this reason, petitioners maintain that a continuing need exists for a decision by this Court based upon a forthright analysis of the pleasure boat problem.

The recent Fifth Circuit decision in *Solyde Drilling & Marine Co. v. Coastal States Gas Producing Co.*, supra (hereafter *Solyde*) emphasizes the unsettled nature of the jurisdictional issue presented in this case. In *Solyde*, the plaintiff had filed suit for property damages arising out of a blowout of its high pressure gas well which occurred while the defendant was performing a workover operation on the well from its submersible drilling barge which, at the time, was resting on the bottom of a dead-end dredged canal slip in Louisiana. The Fifth Circuit found that the district court had improperly assumed admiralty jurisdiction and held that for admiralty jurisdiction to lie over actions brought under the Admiralty Extension Act, the injury complained of must bear a significant relationship to maritime activity. The Court concluded that the plaintiff had failed to establish this requisite relationship.

Although this case dealt primarily with the application of the "locality plus" test to cases under the Admiralty Extension Act, the decision does contain two elements important to the disposition of the jurisdic-

tional question in the case at bar. The first element is the fact that the Fifth Circuit in *Sohyde* chose to rigorously apply a four factor test for admiralty jurisdiction that it had developed in *Kelly v. Smith*, 485 F.2d 520 (5th Cir. 1973). When applying this test to determine the substantial maritime relationship prerequisite to the extension of admiralty jurisdiction a court is to consider: (1) The functions and roles of the parties; (2) The types of vehicles and instrumentalities involved; (3) The causation and type of injury; and (4) Traditional concepts of the role of admiralty law.

When this test is as rigorously applied to the facts of this case as it was in *Sohyde*, those facts support a denial of admiralty jurisdiction. In particular, two of the factors indicate a lack of the substantial maritime relationship necessary for the extension of admiralty jurisdiction. First, as summarized by the trial judge in his opinion (at 470 F.Supp. 699, 700), based on the undisputed facts of this case, the *functions and roles* of the parties had nothing whatsoever to do with maritime commerce:

> (1) One boat was used for pleasure boating, such as boat riding and water skiing, and at the time of the accident the boat was actually pulling a skier on a zip sled;
>
> (2) The other boat was used exclusively for pleasure fishing and was described as a bass boat;

(3) Neither boat had ever been used in any "commercial maritime activity" before the accident;

(4) At the time of the accident neither boat was involved in any "commercial maritime activity" of any sort;

(5) Neither of the two drivers of the boats were being paid to operate the boats nor was this activity in any way part of their regular type of employment;

(6) None of the passengers on either boat were engaged in any kind of "traditional maritime activity" either before or at the time of the accident;

(7) Neither of the boats involved were under hire in any traditional maritime form;

(8) There is no evidence to indicate that any "commercial activity", even in the broadest admiralty sense, had ever been previously engaged in by either of the boats in question, and in fact the two boats would have to be classified as "purely pleasure craft", not in any way "involved in commerce"; and,

(9) There was no other instrumentality involved in this accident that had even a minor relationship to "admiralty" or "commerce"; i.e. a buoy, barge, oil drilling apparatus, etc.

Second, because of this absence of any connection between the accident and maritime commerce, under the *traditional concepts of the role of admiralty law*, admiralty jurisdiction is neither necessary nor appropriate. The Court's discussion of this factor of the *Kelly* test as applied in *Sohyde* is the second element of that decision important to the disposition of the jurisdictional issue in this case. In *Sohyde*, the court acknowledged that the case was "not of such a character that leaving the parties to pursue state law remedies would disturb the federal interest of maintaining the uniformity of maritime law." The Court further stated that "under the circumstances, we believe that the interests of federal-state comity would be best served by having this dispute resolved under state law." [#78-2817 (5th Cir. 5-14-81), at p. 7077].

The same reasoning supports a denial of admiralty jurisdiction in this case. Non-commercial pleasure boat collision disputes are not of such a character that leaving the parties to pursue state law remedies would disturb the federal interest of maintaining the uniformity of maritime law. As petitioners outlined in their First Reason for Granting the Writ, several noted authorities on admiralty jurisdiction agree that such jurisdiction should not be extended to pleasure boat cases unconnected with the commercial shipping industry.

In fact, the extension of admiralty jurisdiction to these cases is not supported by a need for uniformity of

law applied to these disputes. As Professor Stoltz has stated:

> ". . . where commerce stops, the need for uniformity also ends. If commerce is not involved, there is no national interest in uniformity and there is every reason associated with federalism for local power to govern events locally that have only local impact." (*Pleasure Boating and Admiralty: Erie at Sea*, 51 Cal. L.R. p. 661)

Furthermore, Stoltz believes that the operation of these small pleasure craft is so local in nature that a uniform body of law is a positive detriment.

In *Sohyde*, one panel of the Fifth Circuit Court acknowledged these interests of federal-state comity. However, the panel which decided this case failed to recognize that these disputes can and should be handled by the state courts. As indicated in their opinion, the panel believed that admiralty jurisdiction had to be extended to this case merely because the navigational Rules of the Road would be involved. (Appendix "A" of Petition)

The extension of admiralty jurisdiction based on the involvement of these Rules was a mistake. While federal navigational rules must be applicable to the operation of small pleasure craft in navigable waters, there is no impediment to the application of those requirements by the state courts. State courts are not only

allowed, but are mandated, to enforce federal statutes relating to navigation and are to give those rules the same construction as they are given by the federal courts sitting in admiralty. (See authorities cited in Reason III of Petition)

Thus, on the basis of an erroneous belief that only federal courts were authorized to apply the navigational rules, the Fifth Circuit panel in this case ignored the same interests of federal-state comity which have now been recognized by another panel in that same circuit court through the recent *Sohyde* decision.

CONCLUSION

These recent developments only serve to accent the continuing need for a decision by this Court on the important jurisdictional question presented by the facts of this case. Until such a decision is forthcoming, the interests of federal-state comity may continue to be ignored by courts acting without clear authority or analysis from this Court. Furthermore, the continued assertion of admiralty jurisdiction serves no beneficial purpose, since where maritime commerce ends, so ends the need for uniformity. In any event, the state courts are already authorized and mandated to apply navigational rules in conformity with federal court application of those rules. Therefore, both in the interests of comity and in order to relieve an unwarranted burden on the federal courts, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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July ____, 1981

CERTIFICATE OF SERVICE

I hereby certify that three true and correct copies of the foregoing Supplement to Petition for Certiorari to the United States Court of Appeals for the Fifth Circuit have been served on the Honorable Roy Maughan, counsel of record for respondents, Pansy F. Richardson, Donald B. Richardson, Patrick S. Richardson, Joseph S. Richardson, Larry S. Richardson, and Carla Richardson and on the Honorable Victor Marcello, counsel of record for June G. Allen by depositing said copies in the United States mail, postage prepaid, this ____ day of July, 1981.

I further certify that all parties required to be served have been served.

ARTHUR HOWELL ANDREWS

Office - Supreme Court, U.S.
FILED
NOV 16 1981
ALEXANDER L. STEVAS
CLERK

No. 80-2134

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

FOREMOST INSURANCE COMPANY AND SHIRLEY ELISER,

Petitioners,

V.

PANSY F. RICHARDSON, DONALD B. RICHARDSON, PATRICK S. RICHARDSON, JOSEPH S. RICHARDSON, LARRY S. RICHARDSON, CARLA RICHARDSON AND JUNE G. ALLEN,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED JUNE 15, 1981
CERTIORARI GRANTED OCTOBER 5, 1981

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No. 80-2134

IN THE

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JOINT APPENDIX

RELEVANT DOCKET ENTRIES

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

Date	NR.	Proceedings
9/13/76—	1	COMPLAINT . . . issuing 3 summonses
11/ 1/76—	5	Plaintiffs' interrogatories to Foremost Insurance Company and Shirley Eliser.
11/11/76—	6	Interrogatories propounded to plaintiffs by defendants.
12/10/76—	11	Defendants' ANSWER TO INTERROGATORIES.
12/15/76—	15	Plaintiffs' ANSWERS to Interrogatories.
6/60/77—	17	Answer of June G. Allen to complaint, counterclaim against Clyde Richardson, and Crossclaim Shirley Eliserand Foremost Insurance Co.
7/ 7/77—	18	Plaintiff's answer to counterclaim of June G. Allen.
7/ 8/77—	19	Motion of Foremost Insurance Company and Shirley Eliser to Strike and Notice of Hearing 8/5/77.
7/18/77—	20	June G. Allen request for admissions.
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8/ 2/77—	24	Foremost Insurance Co., response to request for admissions . . . entg. 8/4/77.
8/11/77—	25	M.E. . . . EGW . . . on motion of deft. June G. Allen to amend her cross claim and counterclaim to include allegation of diversity jurisdiction and request for trial by jury . . . ORDERED motion to amend complaint to allege diversity jurisdiction and request trial by jury DENIED . . . ORDERED . . . motion of Fore-

	most Insurance Company and Shirley Eliser to strike original complaint, the demand and prayer for trial by jury GRANTED . . . issuing notice entg. 8/16/77.
10/ 3/77—27	MANDAMUS . . . FIFTH CIRCUIT . . . ORDERED . . . petition for writ of mandamus DENIED . . . issuing notice . . . entg. 10/4/77.
10/ 4/77—28	June Allen Interrogatories (missing).
10/ 5/77—29	June Allen's notice of her cross-claim against Shirley Eliser and Foremost Insurance Company without prejudice . . . entg. 10/6/77.
10/14/77—30	Answer of Foremost Insurance Company and Shirley Eliser.
8/11/78—33	M.E. . . . FJP . . . Court finds no basis for admiralty jurisdiction . . . Court reserves right to review jurisdictional issue . . . issuing notice . . . entg 8/16/78.
8/14/78—34	M.E. . . . FJP . . . STATUS CONFERENCE . . . ORDERED . . . on or before 4/7/78 parties file memo of documentary evidence on whether Court has admiralty jurisdiction . . . FURTHER . . . case placed on final pre-trial docket . . . issuing notice . . . entg. 8/16/78.
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6/19/79—53	Notice of Appeal of defdts.
6/21/79—54	Notice of Appeal of June G. Allen, defdt. and counter-claimant.
5/15/81—56	MANDATE . . . Judgment of District Court is REVERSED & REMANDED to USDC . . . FURTHER ORDERED . . . defts.-appellees pay to pltfs.-appellants the costs on appeal.

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

4/28/80	Oral argument before Thornberry, Anderson and Thomas A. Clark, Circuit Judges.
4/28/80	Minute Entry: Court suggested that counsel should file letter with the Clerk commenting on 608 Fed.2nd 123.
5/ 1/80	Filing Appellees letter dated 4/29/80 submitted as supplement to oral argument. (CE)
5/ 7/80	Filing letter dated 5/5/80 of appellee, Allen, citing Fifth Circuit decision. (CE)
4/ 2/81	Opinion rendered.
4/15/81	Petitions for Rehearing - Regular and En Banc.
5/ 4/81	Orders Denying Rehearing (without polling).
6/24/81	Notice of Filing of Petition for Certiorari on 6/15/81.
10/ 9/81	Order of Supreme Court granted 10/5/81.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA
BATON ROUGE, LOUISIANA

PANSY F. RICHARDSON, DONALD B. RICHARDSON, PATRICK S. RICHARDSON, JOSEPH S. RICHARDSON, LARRY S. RICHARDSON and CARLA RICHARDSON **NUMBER 76-280**

VERSUS

FOREMOST INSURANCE COMPANY, SHIRLEY ELISER and JUNE G. ALLEN **JURY REQUESTED**

* * * * *

1.

Plaintiffs reside at General Delivery, Brittany, Louisiana 70718; Foremost Insurance Company is a foreign Insurance Company domiciled in a state other than Louisiana, but doing business in the State of Louisiana; Shirley Eliser resides at Rt. 4, Box 263, Gonzales, Louisiana; June G. Allen resides at P. O. Box 136, Trailerland Trailer Park, Prairieville, Louisiana; Jurisdiction is conferred by virtue of the fact that the accident happened on navigable waters in this state.

2.

Pansy F. Richardson is the surviving wife of Clyde Richardson; Donald B. Richardson, Patrick S. Richardson, Joseph S. Richardson, Larry S. Richardson and Carla Richardson are major children and issue of the marriage of Pansy F. Richardson and Clyde Richardson.

3.

On April 25, 1976 Clyde Richardson was killed in a boating accident which occurred on the Amite River approximate-

ly one-half to three-fourths miles below the French Settlement Bridge due to the combined concurrent, joint negligence of Shirley Eliser and June G. Allen; at the time of the accident Foremost Insurance Company insured Shirley Eliser. Pansy F. Richardson desires and is entitled to the sum of One Hundred Fifty Thousand Dollars ($150,000) as damages for the untimely death of her husband.

4.

The major children, plaintiffs therein, desire and are entitled to the sum of Twenty-Five Thousand Dollars ($35,000) each as damages for the untimely death of their father.

WHEREFORE, plaintiffs pray for judgment insolido against Foremost Insurance Company, Shirley Eliser, and June G. Allen in the Following amounts:

Pansy F. Richardson—One Hundred Fifty Thousand Dollars ($150,000)

Donald B. Richardson—Thirty-Five Thousand Dollars ($35,000)

Patrick S. Richardson—Thirty-Five Thousand Dollars ($35,000)

Joseph S. Richardson—Thirty-Five Thousand Dollars ($35,000)

Larry S. Richardson—Thirty-Five Thousand Dollars ($35,000)

Carla Richardson—Thirty-Five Thousand Dollars ($35,000)

Plaintiffs further pray for trial by jury.

Respectfully submitted,

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Telephone: (504) 926-8533

BY: /s/Roy Maughan
Roy Maughan

(CAPTION OMITTED IN PRINTING)

NUMBER 76-280

ANSWER, COUNTERCLAIM, and CROSS-CLAIM OF JUNE G. ALLEN

NOW INTO COURT, through undersigned counsel, comes JUNE G. ALLEN, purportedly made respondent herein, and for answer to the complaint of Pansy F. Richardson, et als, filed herein, denies each and every allegation of that complaint, except such thereof as may be expressly admitted in this Answer.

FIRST DEFENSE

The complaint fails to state a claim against this respondent upon which relief can be granted.

SECOND DEFENSE

Further answering said complaint categorically, respondent avers, alleges and pleads as follows:

1.

Respondent admits all allegations of Paragraph 1 of plaintiffs' complaint, except as to the residence of June Allen.

2.

For lack of sufficient information to justify a belief thereof, respondent denies the allegations of Paragraph 2.

3.

Respondent admits that on April 25, 1976, Clyde Richardson was killed in a boating accident which occurred on the Amite River approximately one-half to three-fourths miles below the French Settlement Bridge and further admits that

at the time of this accident, Foremost Insurance Company insured Shirley Eliser. Further answering Paragraph 3, defendant denies all remaining allegations of Paragraph 3.

4.

Respondent denies all allegations of Paragraph 4.

COUNTERCLAIM

June Allen now assumes the position of complainant for purposes of this Counterclaim and respectfully represents that:

1.

The following parties are made defendants in this counterclaim:

Pansy F. Richardson, Donald B. Richardson, Patrick S. Richardson, Joseph S. Richardson, Larry S. Richardson, and Carla Richardson, all of whom reside at General Delivery, Brittany, Louisiana 70718.

2.

On April 25, 1976, June Allen was a passenger in a boat being driven by Clyde Richardson on the Amite River.

3.

When Richardson approached a point approximately one-half to three-fourths miles below the French Settlement Bridge on said river, his boat collided with a boat being driven in the opposite direction by Shirley Eliser.

4.

The above described accident was caused solely by the combined, concurrent, and joint negligence of Shirley Eliser and Clyde Richardson in the following described particulars:

A. Both parties failed to keep a proper lookout;

B. Both parties failed to observe all applicable rules of the road;

C. Both parties were driving their respective watercraft in a negligent and reckless manner;

D. Both parties failed to maintain control of their watercraft;

E. Both parties committed other acts of negligence which will be proved at the trial of this matter or which are solely within their own knowledge at the present time.

5.

As a result of the above described accident, June Allen suffered severe and painful personal injuries, including, but not limited to, the following: injuries to her jaw, heart, and teeth. As a result of the foregoing injuries, June Allen is entitled to the full sum of TWO HUNDRED FIFTH THOUSAND AND NO/100 ($250,000) DOLLARS.

6.

June Allen alleges that respondents unconditionally accepted the Succession of Clyde Richardson in the proceedings entitled "Succession of Clyde Richardson, Probate Number 6140, 23rd Judicial District Court, Parish of Ascension; as a result of this unconditional acceptance, respondents are liable to June Allen for all damages caused by the negligence of the deceased, Clyde Richardson.

CROSS-CLAIM

June Allen now assumes the position of cross-claimant, and for purposes of this cross-claim respectfully represents that:

1.

The following parties are made defendants in this cross-claim:

A. Shirley Eliser, who is domiciled in the Parish of Ascension and resides at Route 4, Box 263, Gonzales, Louisiana;

B. Foremost Insurance Company, a Michigan insurance company domiciled in Grand Rapids, Michigan and licensed to do business and doing business in the State of Louisiana.

2.

June Allen incorporates by reference paragraphs 2 through 5 of the counterclaim outlined hereinabove as though said paragraphs were set forth in full herein.

3.

June Allen respectfully represents that Shirley Eliser and the Foremost Insurance Company are jointly and solidarily liable with the respondents in the aforementioned counterclaim for all damages outlined in said counterclaim hereinabove.

4.

June Allen further alleges and avers that on the date of the above described accident, there was in existence and effect a policy of liability insurance issued to Shirley Eliser by Foremost Insurance Company which provided liability insurance protection and coverage for all of the damages sustained by June Allen herein.

WHEREFORE, June Allen prays for judgment:

I. On the main demand, rejecting the demand of Pansy F. Richardson, Donald B. Richardson, Patrick F. Richardson,

Joseph S. Richardson, Larry S. Richardson and Carla Richardson and assessing the costs of this proceeding against the said complainants;

II. On the counterclaim and cross-claim demands, in favor of June Allen and against Shirley Eliser, Foremost Insurance Co., Pansy F. Richardson, Donald B. Richardson, Patrick S. Richardson, Joseph S. Richardson, Larry S. Richardson and Carla Richardson in the full sum of TWO HUNDRED FIFTY THOUSAND AND NO/100 ($250,000) DOLLARS, together with legal interest thereon from date of judicial demand and for all costs of these proceedings.

By Attorneys:

TALBOT, SOTILE, CARMOUCHE,
WAGUESPACK & MARCHAND
P. O. Drawer 669
Donaldsonville, LA 70346

BY: /s/Victor Marcello

(Certificate omitted in printing)

(Caption omitted in printing)

CIVIL ACTION
NUMBER: 76-280

ANSWER

The answer of Foremost Insurance Company and Shirley Eliser, sought to be made defendants herein, with respect represent that:

FIRST DEFENSE

This court lacks jurisdiction over the subject matter of this litigation.

SECOND DEFENSE

The complaint fails to state a claim upon which relief can be granted.

THIRD DEFENSE

And now answering the numbered paragraphs of the complaint, these defendants deny each and every allegation contained therein except those which may be hereinafter specifically admitted.

And now further answering the allegations of the numbered paragraphs of the complaint, with respect, represent that:

1.

These defendants admit their domicile and status but deny the other allegations contained in Paragraph 1 of the complaint for lack of sufficient information to justify a belief.

2.

The allegations contained in Paragraph 2 of the complaint are denied for lack of sufficient information to justify a belief.

3.

For answer to the allegations contained in Paragraph 3 these defendants admit that Clyde Richardson was killed in a boating collision but deny the other allegations contained in Paragraph 3 of the complaint as written.

4.

The allegations contained in Paragraph 4 of the complaint are denied.

FOURTH DEFENSE

This cause does not fall within this Honorable Court's admiralty jurisdiction.

FIFTH DEFENSE

In the alternative event that this court finds it has jurisdiction over this claim then defendants aver that the sole cause of the collision was the negligence, improper navigation and poor seamanship of June G. Allen in that she was operating the boat while under the influence of alcohol, operating the boat when she knew she was unskilled in its operation and did not know how to properly and safely operate the craft, failed to keep to the right side of the stream, failed to heed oncoming boat traffic and was otherwise negligent.

SIXTH DEFENSE

In the further alternative, Clyde Richardson was guilty of negligence which contributed to his death and which bars

claimant's right to recovery in that he allowed June Allen to operate his boat when he knew she could not properly operate the vessel and was unskilled to do so, allowing himself to become intoxicated so that he could not operate the vessel, failed to properly instruct June Allen in the operation of the vessel and was otherwise negligent, and thus, any judgment which claimants may be entitled to recover should be reduced accordingly.

SEVENTH DEFENSE

In the further alternative, June G. Allen and Clyde Richardson were on a joint venture and had equal control over the operation of the boat and thus the negligence of June Allen is imputed to Clyde Richardson and his heirs in bar of his right to recovery, or should otherwise reduce the judgment.

WHEREFORE, Foremost Insurance Company and Shirley Eliser pray that this answer be deemed good and sufficient and that after all due proceedings had that there be judgment in their favor and against the complainants, dismissing the complaint at their costs, and for all other equitable relief.

By Attorneys:

FRANKLIN, MOORE & WALSH
P. O. Box 3958
Baton Rouge, Louisiana 70821
(504) 383-2608

ARTHUR H. ANDREWS

(Certificate omitted in printing)

(Caption omitted in printing)

CIVIL ACTION NO. 76-280

NOTICE OF DISMISSAL OF ACTION

TO: Mr. Arthur H. Andrews
P. O. Box 3958
Baton Rouge, Louisiana

Mr. Dorsey C. Martin, III
1755 Wooddale Blvd.
Baton Rouge, Louisiana 70806

Please take notice that the defendant, June G. Allen, dismisses her cross-claim filed herein against Shirley Eliser and Foremost Insurance Company, without prejudice.

By Attorneys:

TALBOT, SOTILE, CARMOUCHE,
WAGUESPACK & MARCHAND
P. O. Drawer 669
Donaldsonville, Louisiana 70346

BY: /s/Victor Marcello

(Certificate omitted in printing)

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF LOUISIANA

MINUTE ENTRY:
MARCH 14, 1978
POLOZOLA, M.

PANSY F. RICHARDSON, ET AL.

VERSUS

CIVIL ACTION
NUMBER 76-280

FOREMOST INSURANCE COMPANY, ET AL.

Status conference was held this date.

PRESENT: Roy Maughan, Esq.
Attorney for Plaintiff

Arthur H. Andrews, Esq.
Attorney for Foremost Ins. Co., et al.

Victor L. Marcello, Esq.
Attorney for June G. Allen

The Court having questioned the jurisdiction of the Court herein:

IT IS ORDERED that on or April 7, 1978, the parties shall file a memorandum and documentary evidence on whether the Court has admiralty jurisdiction.

IT IS FURTHER ORDERED that this case be placed on the final pre-trial docket.

UNITED STATES MAGISTRATE

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF LOUISIANA

MINUTE ENTRY:
AUGUST 11, 1978
POLOZOLA, M.

PANSY F. FICHARDSON, ET AL.

VERSUS

CIVIL ACTION
NUMBER 76-280

FOREMOST INSURANCE COMPANY, ET AL.

This suit arises out of a collision between two pleasure boats on the Amite River. At a status conference held before the United States Magistrate, the Court questioned the jurisdiction of the Court in this case. The parties were ordered to file briefs and documentary evidence on the issue. The Court has now reviewed the briefs and the factual evidence submitted by the parties.

While the evidence submitted by the parties was far from being complete, the Court finds that based on the evidence in the record at this time, the Court does have admiralty jurisdiction herein.

The Court reserves its right to again review the jurisdictional issue when the facts of this case are fully presented to the Court.

UNITED STATES MAGISTRATE

Pansy F. RICHARDSON, Donald B. Richardson, Patrick S. Richardson, Joseph S. Richardson, Larry S. Richardson, and Carla Richardson

v.

FOREMOST INSURANCE COMPANY,

Shirley Eliser and June G. Allen

Civ. A. No. 76-280

United States District Court, M.D. Louisiana

May 23, 1979

E. GORDON WEST, District Judge:

The sole issue before the court is whether or not, under the admitted facts i nthis case, this court is vested with "admiralty jurisdiction." The incident giving rise to this litigation involved a collision between two "pleasure" boats. One was an eighteen foot pleasure boat powered by a 185 h.p. Johnson outboard motor that was being used for water skiing purposes at the time of the accident. The other was a sixteen foot "bass boat" powered by an outboard motor that was used exclusively for pleasure fishing. At the time of the accident the two boats were headed in opposite directions on the Amite River. The point of impact was in a curve some one-half to three-quarters of a mile downstream from the French Settlement bridge. The bass boat was proceeding northward and apparently made a left turn into the path of the southbound ski boat.

Assuming, for the purpose of this opinion, that the Amite River, at the point of collision, is "navigable", the dispositive issue, in this case, is whether or not there is a "sufficient

relationship to traditional maritime activity" to warrant the extension of admiralty jurisdiction to this litigation.

For the reasons hereinafter set forth, we conclude that under the facts of this case this court is not vested with admiralty jurisdiction.

The following facts are undisputed:

(1) One boat was used for pleasure boating, such as boat riding and water skiing, and at the time of the accident the boat was actually pulling a skier on a zip sled;

(2) The other boat was used exclusively for pleasure fishing and was described as a bass boat;

(3) Neither boat had ever been used in an "commercial maritime activity" before the accident;

(4) At the time of the accident neither boat was involved in any "commercial maritime activity" of any sort;

(5) Neither of the two drivers of the boat were being paid to operate the boat nor was this activity in any way a part of their regular type of employment;

(6) None of the passengers on either boat were engaged in any kind of "traditional maritime activity" either before or at the time of the accident;

(7) Neither of the boats involved were under hire in any traditional maritime form;

(8) There is no evidence to indicate that any "commercial activity", even in the broadest admiralty sense, had ever been previously engaged in by

either of the boats in question, and in fact the two boats would have to be classified as "purely pleasure craft", not in any way "involved in commerce"; and,

(9) There was no other instrumentality involved in this accident that had even a minor relationship to "admiralty" or "commerce", i.e. a buoy, barge, oil drilling apparatus, etc.

In short, this case squarely presents the factual issue of whether or not "admiralty jurisdiction" must be extended to an accident occurring between two pleasure boats in the purest sense of the word, and in which there is absolutely no "commercial" or "traditional maritime activity" whatsoever involved.

In our analysis it must first be noted that some of the most respected admiralty commentators lean heavily toward the stand now taken by this court that this particular case is not one which was meant to be covered by the admiralty jurisdiction of the federal courts.

Professors Gilmore and Black state the following in their treatist, *The Law of Admiralty*, Second Edition:

"The following are doubtful areas, (for invoking admiralty jurisdiction) where generalization is dangerous:

Torts occurring on navigable waters, but having no other maritime connection." (*The Law of Admiralty*, Second Edition, pp. 27, 28; parenthesis added)

However, Professors Gilmore and Black do not stop here. Their treatise contains numerous quotes aimed at the very heart of this case at bar; such as:

"In the main, the outlines of the jurisdiction seem to have been pretty well drawn. Its evaluation requires the balancing of two factors pulling in opposite directions. First, if there is any sense at all in having a separate basis for admiralty jurisdiction in the federal courts, it must be because there is a federal interest that can best be implemented by thus dealing with the major concerns of the *shipping industry* — with all of them, and not just with a few of them selected on antiquarian criteria."

"Whether a given inclusion within or exclusion from the jurisdiction is warranted must depend on the general sense and policy of having the jurisdiction at all. It is hard to think of any better reason for having this jurisdiction than its aptness for providing a special-industry court for the *maritime industry*. If this is right, then some modern decisions wander far off the mark. One thinks of the cases bringing airplane accidents within the jurisdiction, just because the plane happens to crash on navigable waters, and the inclusion of such mishaps as surfboard accidents, or *motorboat accidents* on lakes substantially landlocked. *Happily, these cases have* (to some not yet certain extent) *been overruled, at the highest level. It may be hoped that this overruling is thoroughly general . . . Ideally, the jurisdiction out* (sic) *to include those and only those things principally connected with maritime transportation. Summarily, the lower courts have been over-inclusive as to torts,* and under-inclusive as to contracts." (*The Law of Admiralty,* Second Edition, pp. 29-31; emphasis added)

Benedict on Admiralty, Seventh Edition (Revised), is another important treatise in which several selected quotes would strongly indicate that the particular facts in this case do not merit the extension of admiralty jurisdiction:

". . . maritime law is not a monistic system. Where, although a matter is maritime, there may be over-

whelming considerations requiring state regulation and if such state law does not disturb the general uniformity of maritime law, its application to cases 'maritime but local' will be valid. It is not always easy in borderline cases to determine how the accommodation between state and federal concern should be made. One distinction appears to be that where obligations are imposed by virtue of the authority of state or Federal government, the court must attempt to balance the interests, but where the obligations are assumed voluntarily, as in a contract, they ought to be judged by the law applying to the real nature of the transaction." (*Benedict on Admiralty*, Seventh Edition (Revised) Section 127, pp. 8-47 thru 8-49)

Louisiana, with its roots sunk deeply into the maritime arena, has been one of the leading states in the molding and shaping of the constraints of admiralty jurisdiction. In a recently published book on this subject several noted Louisiana attorneys spoke about the factual situation which now presents itself to this court:

"The second constructive reduction of the admiralty jurisditcion is the *requirement of a maritime connection along with the locus of the accident to support maritime jurisdiction. . . .* The court mentioned that in the Fifth Circuit's decision in *Watts v. Zapata Offshore Co.*, it had been said that only minimal maritime connection was required once you had the sufficient maritime locus.

"What, then, were the considerations of whether there was sufficient maritime connection for this accident. The *Peytavin* court, in finding there was not sufficient maritime connection in that case pointed out that neither the parties, nor the nature, nor the apparent cause of the accident, nor the injury sustained demonstrated any further connection with maritime interests. It is necessary to keep in mind

what considerations are involved in the determination of "maritime connections."

"As a result, *now not only do you have to have the locus, you need the pure maritime connection for admiralty jurisdiction.*

"The district courts are going to have a struggle too, because it would appear that they must now come to grips with something previously unheard of: *maritime connexity as an adjunct to the locus theory.*" (Recent Development in the Law of Maritime Torts, edited by Boland and Dodd; pp. 22-26 (1972))

The foregoing analysis leads us directly to two cases which must be closely examined by this court. *Executive Jet Aviation, Inc. v. City of Cleveland, Ohio,* 409 U.S. 249, 93 S.Ct. 493, 34 L.Ed.2d 454, 1973 AMC 1(1972); and *Kelly v. Smith,* 485 F.2d 520, 1973 AMC 2478 (CA 5-1973).

In *Executive Jet* the United States Supreme Court recognized the time honored rule that the "locality" of the wrong was traditionally the deciding point in whether or not admiralty jurisdiction was present. However, in an in-depth review of prior jurisprudence the court recalled some serious difficulties with the blind application of the locality test. Based on this the court stated:

"In sum, there has existed over the years a judicial, legislative, and scholarly recognition that, in determining whether there is admiralty jurisdiction over a particular tort or class of torts, reliance on the relationship of the wrong to traditional maritime activity is often more sensible and more consonant with the purposes of maritime law than is a purely mechanical application of the locality test." (93 S.Ct. at 501)

Of course, *Executive Jet* dealt with an aircraft accident.

This is not the situation in the case at bar. However, the principles of *Executive Jet*, and more importantly its progeny, will have an impact on this case.

Likewise, in *Kelly v. Smith*, supra, the Fifth Circuit recognized the absurdity of applying the "strict locality test", and stated:

> "The analysis and thrust of *Executive Jet*, coupled with our decision in *Peytavin*, dictate the conclusions that maritime locality alone is no longer sufficient to sustain maritime jurisdiction, and that the wrong must bear a significant relationship to maritime activity." (485 F.2d at 524)

The court in *Kelly* was steadfast in adhering to a policy whereby some significant relationship to a recognized maritime activity was required before admiralty jurisdiction would be invoked. (see generally 485 F.2d at 524).

With these two cases as a backdrop, our examination continues with the "locality plus" test that was discussed in *Kelly v. Smith*, supra. The court in *Kelly* stated that it must "look to all the circumstances for a substantial maritime relationship. Both *Peytavin* and *Executive Jet* offer guidelines for the determination." (485 F.2d at 525) The court then went on to list certain factors in that case which caused it to invoke the admiralty jurisdiction:

> "From the facts and analysis of *Executive Jet* and *Peytavin* we can discern factors to be considered in the circumstances before us: the functions and roles of the parties; the types of vehicles and instrumentalities involved; the causation and the type of injury; and traditional concepts of the role of admiralty law." (485 F.2d at 525)

The Fifth Circuit concluded its analysis with the state-

ment that: "Policy militates toward admiralty jurisdiction in this case." (485 F.2d at 526) It is not clear how much of the "policy" involved dealt with the fact that the plaintiffs in *Kelly* would have been barred due to the applicable state prescriptive period as opposed to the doctrine of laches used in admiralty. However, it did play some part. (see generally 485 F.2d at 526) The prescription versus laches argument is not present in the instant case since suit was filed well before one year elapsed from the date of the accident.

Most importantly to this case, the discussion in the *Kelly* case indicated that there was either some "commercial activity" or some "traditional maritime connection" present to invoke admiralty jurisdiction. It seems clear from the facts in *Kelly* that the case dealt, at least to some degree, with what this court might term "piracy" in that the plaintiffs were admittedly poaching on the land which the defendant, J. C. Smith, had been hired to protect.

When the location of the injury is on or in a navigable waterway, the requirement of a "traditional maritime connection" becomes less stringent. In *Kelly v. Smith*, supra, the poaching or piracy, with its commensurate miniwar between the parties in a stretch of the Mississippi River which is conclusively navigable, was enough to trigger the admiralty jurisdiction of the federal court. However, in the case at bar this court can find no "traditional maritime connection" between the injuries received and the location of the tort. Admiralty jurisdiction was created to serve the commercial shipping industry's interests by providing a stable and constant body of law which is to be used in the resolution of litigation arising between those people actually engaged in it. The tremendous increase in the number of small pleasure boats, whether for skiing or pleasure fishing, is a contemporary problem. When the owners of these watercrafts have absolutely no

commercial or traditional maritime interests which require the protection of the admiralty side of the federal judiciary, then admiralty jurisdiction should be withheld. In this context Professor Stoltz feels that the operation of small pleasure craft is so "local" in nature that a uniform body of law is a detriment and that instead, the jurisdiction of these cases should be transferred to the states. Professor Stoltz stated:

> ". . . where commerce stops, the need for uniformity also ends. If commerce is not involved, there is no national interest in uniformity and there is every reason associated with federalism for local power to govern events locally that have only local impact." (*Pleasure Boating and Admiralty: Erie at Sea*, 51 Cal.L.R. p. 661)

Once again we see another commentator agreeing that when there is a complete lack of any "commercial" or "traditional maritime connection", as in the case at bar, then admiralty jurisdiction should be withheld.

This court's decision that, in this particular type of case, there is no admiralty jurisdiction, is further bolstered by several other cases. At first blush each of these other cases might seem to indicate that this court is in error. However, upon a close examination it can be readily determined that in each of the factual situations some quality of "commerce" or "traditional maritime activity" was connected with the accident.

In *Kaiser v. Travelers Insurance Co.*, 359 F.Supp. 90 (E.D. La.-1973), the connection was the fact that the water skier hit a sunken barge. In *Gele v. Chevron Oil Company*, 574 F.2d 243 (CA 5-1978), the connection was that the pleasure boat collided with a sunken barge. And finally, in two cases brought before this court, *Butler v. Amoco Production Company* (CA No. 74-94) and *Langlois v. Dow Chemical Com-*

pany (CA No. 78-402), we have extended admiralty jurisdiction to cases in which the only connection was that each of the pleasure boats involved struck a pipe anchored to an old drilling rig which was a few inches under the water level in a bayou.

As can be seen from each of these cited cases, there was some "commercial" or "traditional maritime" connection, regardless of how small, which, when coupled with the location of the accident, could properly invoke the admiralty jurisdiction of a federal court. However, in the case at bar no such minimal connection exists and, based on the guidelines of *Peytavin* and *Executive Jet*, admiralty jurisdiction cannot be properly extended, regardless of the location of the accident.

Just as the court in *Kelly v. Smith*, supra, set forth a non-exclusive list of factors to be considered, this court also finds such a listing to be helpful. When a court considers whether or not to extend admiralty jurisdiction to a case involving purely pleasure crafts, the following list offers some guidelines to aid in the admiralty jurisdiction question:

(1) Was the boat(s) involved being used for a purely pleasure type operation;

(2) Has the boat(s) involved ever been previously used in any type of commercial or maritime operation;

(3) Was the driver of the boat(s) under hire;

(4) Were any of the passengers under hire to perform any traditional maritime functions;

(5) Was there any instrumentality of commercial or maritime connection involved in any way with the accident;

(6) Are there any policy considerations involved which should encourage the court to find in favor of admiralty jurisdiction; and/or

(7) Are there any traditional concepts or modern applications of the role of admiralty which could be involved that would invoke admiralty jurisdiction.

The list is merely illustrative of the type of indepth analysis which a court should undertake before deciding whether or not admiralty jurisdiction is present in a particular case involving one or more purely pleasure boats. In the case at bar all of the answers to the aforementioned list are in the negative. Had any one of them been in the affirmative, then that fact, coupled with the location of the tort, might be sufficient to invoke the admiralty jurisdiction of the federal court.

From the Laws of Oleron to *Executive Jet* the role of "admiralty jurisdiction" has undergone many a metamorphosis. It will probably continue to do so. This court finds that one metamorphosis which must be recognized is that when an accident involving one or more vessels occurs on or in a navigable body of water and involves purely pleasure boats in which there is not the slightest scintilla of either "commercial" activity or "traditional maritime activity" involved, then the admiralty jurisdiction of the federal court should not be invoked.

Therefore, based on the foregoing factual and legal analysis it is the opinion of this court that plaintiff's claim cannot be maintained in admiralty. The plaintiff's suit will be dismissed.

Judgment will be entered accordingly.

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF LOUISIANA

PANSY F. RICHARDSON, DONALD B. RICHARDSON, PATRICK S. RICHARDSON, JOSEPH S. RICHARDSON, LARRY S. RICHARDSON, AND CARLA RICHARDSON

VERSUS

CIVIL ACTION NUMBER 76-280

FOREMOST INSURANCE COMPANY, SHIRLEY ELISER AND JUNE G. ALLEN

JUDGMENT

For written reasons assigned and filed in the record of this case:

IT IS ORDERED, ADJUDGED AND DECREED that this suit be, and it is hereby DISMISSED.

Baton Rouge, Louisiana, May 23, 1979.

/s/ E. Gordon West
United States District Judge

(Caption omitted in printing)

(Caption omitted in printing)

CIVIL ACTION

NUMBER 76-280

NOTICE OF APPEAL

Notice is hereby given that Pansy F. Richardson, Donald B. Richardson, Patrick S. Richardson, Joseph S. Richardson, Larry S. Richardson, and arla Richardson, plaintiffs herein, hereby appeal to the United States Court of Appeal for the Fifth Circuit from the final judgment dismissing plaintiffs' case entered in this action on the 23rd day of May, 1979.

MAUGHAN, ATKINSON & MARTIN, LTD.
1755 Wooddale Boulevard
Baton Rouge, Louisiana 70806
Phone: (504) 926-8533

By: Roy Maughan

(Certificate omitted in printing)

(Caption omitted in printing)

CIVIL ACTION
NUMBER 76-200

NOTICE OF APPEAL

Notice is hereby given that June G. Allen, counter-claimant and defendant in the above matter, hereby appeals the United States Court of Appeals for the Fifth Circuit from the final judgment of the United States District Court for the Middle District of Louisiana entered in this action on the 23rd day of May, 1979. June 6, 1979.

By Attorneys:

TALBOT, SOTILE, CARMOUCHE,
WAGUESPACK & MARCHAND
P. O. Drawer 669
Donaldsonville, LA 70346

By: Victor L. Marcello

(Certificate omitted in printing)

Pansy F. RICHARDSON, Donald B. Richardson, Patrick S. Richardson, Joseph S. Richardson, Larry S. Richardson, and Carla Richardson, Plaintiffs-Appellants-Cross Appellees,

v.

FOREMOST INSURANCE COMPANY, Shirley Eliser and June G. Allen, Defendants-Appellees,

June G. Allen, Defendant-Appellee-Cross Appellant.

No. 79-2542.

United States Court of Appeals, Fifth Circuit.

April 2, 1981.

Appeals from the United States District Court for the Middle District of Louisiana.

Before THORNBERRY, ANDERSON and THOMAS A. CLARK, Circuit Judges.

THOMAS A. CLARK, Circuit Judge:

This is an appeal from the dismissal of plaintiffs' complaint on the ground that it did not state a cause of action that was within the admiralty jurisdiction of the lower court. The incident giving rise to the complaint involved a collision between two pleasure boats on the upper reaches of the Amite River. The district court, 470 F.Supp. 699, reasoned that the facts of the case did not present a sufficient relationship to traditional maritime activity to warrant the extension of admiralty jurisdiction to this litigation. While there is much logic and good sound policy reasons that support the district

court's holding, we regretfully conclude that precedent does not permit us to take this far-reaching step. Additionally, there is uniformity in the present rule that admiralty jurisdiction extends to all accidents occurring between surface vessels on navigable waters. The benefits derived from this certainly override the policy considerations advanced by the appellees in support of the district court's ruling.

The accident giving rise to this litigation was between one pleasure boat being used to pull a skier on a "zip sled" and a pleasure boat used for sporttfishing but under way at the time. Neither boat had ever been involved in commercial maritime activity. There was no involvement at the time of the accident of any buoy, barge, or underwater obstruction.

The district court concluded that there was a lack of admiralty jurisdiction and defined the issue as follows:

> In short, this case squarely presents the factual issue of whether or not "admiralty jurisdiction" must be extended to an accident occurring between two pleasure boats in the purest sense of the word, and in which there is absolutely no "commercial" or "traditional maritime activity" whatsoever involved.

The district court referred to the views of certain text writers in the field[1] and then examined and relied on three cases that unquestionably control the decision of this case, those being *Executive Jet Aviation, Inc. v. City of Cleveland, Ohio,* 409 U.S. 249, 93 S.Ct. 493, 34 L.Ed.2d 454 (1972), *Kelly v. Smith,* 485 F.2d 520 (5th Cir. 1973), and *Peytavin v. Government Employees Insurance Co.,* 453 F.2d 1121 (5th Cir. 1972).

Those three cases very simply may be said to hold that

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1. Gilmore and Black, **The Law of Admiralty**, 2d ed., 1975; **Benedict on Admiralty**, 7th ed. (Revised); and, Boland and Dodd, **Recent Developments in the Law of Maritime Torts** (1972).

admiralty jurisdiction requires more than the occurrence of the tort on navigable waters — that additionally there must be a significant relationship between the wrong and traditional maritime activity. Thus, we agree with the district court in the statement of the rule. We differ from the district court in the application of the rule to the facts in this case.

We hold that two boats, regardless of their intended use, purpose, size, and activity, are engaged in traditional maritime activity when a collision between them occurs on navigable waters. We say this because boats, regardless of their size, purpose, and activity, are governed by the same "Rules of the Road" as the largest seagoing vessel when those boats are traversing navigable waters. As such, the owners and operators of the vessels are bound by those rules, and their negligent operation or absence of negligent operation is so governed. We do not find that any of the three cases which are our guideposts require that the maritime activity be an exclusively commercal one. We sympathize with those writers and scholars who strongly believe that admiralty jurisdiction should be limited to only litigation involving commercial activity on navigable waters. We recognize that the Fourth Circuitt in *Crosson v. Vance*, 484 F.2d 840 (4th Cir. 1973), holds otherwise than we do here. We note that the Eighth Circuit in *St. Hilaire Moye v. Henderson*, 496 F.2d 973 (8th Cir. 1974), has held that admiralty jurisdiction does extend to an accident identical to this. The Seventh Circuit in *Chapman v. United States*, 575 F.2d 147 (7th Cir. 1978), held that admiralty jurisdiction did not extend in that case because the once navigable waterway is now used only for recreational activities. In footnote 10 the court said: "The reach of admiralty jurisdiction over pleasure boat mishaps occurring in navigable waters used for commercial activity is, of course, not before us." 575 F.2d at 150, n. 10.

Our decision in this case is strongly influenced by the holding in *Kelly v. Smith, supra*, in which this court stated that "[a]dmiralty has traditionally been concerned with furnishing remedies for those injured while traveling navigable waters." *Id.* at 526. That case dealt with an unusual factual situation where gunfire was exchanged between occupants of a pleasure boat on the Mississippi River and persons standing on an island. The court placed emphasis on the danger presented by gunfire being directed at a vessel, although a small one, on a major commercial artery. We note a strong dissent in that case by Judge Morgan but believe that the facts in this case are more closely related to traditional maritime activities than those in the *Kelly* case because the rules governing navigation of all vessels govern the operation of the boats involved in the collision in this case.

If we were to hold that admiralty jurisdiction did not reach this litigation, we would be injecting an uncertainty that would plague litigants and the courts. For example, in the case of non-commercial navigators traveling on navigable waters that are shared by more than one state, their obligations and duties would be subject to differing standards depending on their precise location within the territorial jurisdiction of one state or another. Moreover, non-commercial navigators everywhere would be subject to yet another conflict in applicable standards of behavior depending upon whether their activity later turns out to be sufficiently "commercial," and, therefore, solely a matter for the states. Only a uniform admiralty law, extending to non-commercial as well as commercial navigators, avoids these problems.

We note additionally from the record that the place where the accident occurred is seldom, if ever, used for commercial activity. That does not cause us to vary from our holding. The waterway is not landlocked. It would be introducing an-

other note of uncertainty to hold that admiralty jurisdiction extends only to a stretch of navigable water that presently functions as a commercial artery. Jurisdiction should be a readily ascertainable as courts can make it. If the waterway is capable of being used in commerce, that is a sufficient threshold to invoke admiralty jurisdiction.

We remand to the district court for consideration of the case on the merits.

REVERSED and REMANDED.

THORNBERRY, Circuit Judge, concurring in part; dissenting in part:

Admiralty jurisdiction does not encompass actions in tort unless the wrong occurs on navigable waters and bears a significant relationship to traditional maritime activity. *Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249, 93 S.Ct. 493, 34 L.Ed.2d 454 (1972); *Kelly v. Smith*, 485 F.2d 520 (5th Cir. 1973). The district court in this instance found it unnecessary to reach the navigable issue, since it found the "traditional maritime activity" criterion dispositive of the case. Although I am sympathetic with that court's conclusion that pleasure boating is not the stuff of which admiralty jurisdiction should be made, the question is no longer open for us to decide, since this Court has held that noncommercial activity does fall within the ambit of admiralty jurisdiction. *Kelly, supra.*

It is important to note, however, that the *Kelly* decision preserved a link (though certainly a weak one) with commercial activity that the majority in this case severs completely. The Court justified its decision in *Kelly* as follows:

> Rifle fire directed at a vessel, albeit a small one, *on a major commercial artery*, and injuring the

> pilot, presents sufficient danger *to maritime commerce* for the federal courts of admiralty to assume jurisdiction and to furnish remedies to those aboard the vessel and injured by that conduct.

Id. at 526 (emphasis added). In contrast, there is no hint in the case before us that the tort created a similar "danger to maritime commerce" and thus no trace of *any* federal interest at stake in this case. Because I believe that the desire for certainty cannot alone justify the assumption of federal control over matters of purely local concern, I would remand for a finding on whether the stretch of river where the accident occurred functions as an artery of commerce. *See Chapman v. United States*, 575 F.2d 147, 151 (7th Cir. 1978) (en banc); *Adams v. Montana Power Co.*, 528 F.2d 437 (9th Cir. 1975). Since the majority finds it unnecessary to answer this question, I respectfully dissent.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 79 2542

D. C. Docket No. CA 76 280

PANSY F. RICHARDSON, DONALD B. RICHARDSON, PATRICK S. RICHARDSON, JOSEPH S. RICHARDSON, LARRY S. RICHARDSON, AND CARLA RICHARDSON,
Plaintiffs-Appellants-
Cross-Appellees,

versus

FOREMOST INSURANCE COMPANY, SHIRLEY ELISER AND JUNE G. ALLEN, JUNE G. ALLEN,
Defendants-Appellees,
Defendant-Appellee,
Cross-Appellant.

Appeal from the United States District Court for the Middle District of Louisiana

Before THORNBERRY, ANDERSON and THOMAS A. CLARK, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Louisiana, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and the same is hereby

remanded to the said District Court in accordance with the opinion of this Court.

IT IS FURTHER ORDERED that the defendants-appellees pay to the plaintiffs-appellants, the costs on appeal to be taxed by the Clerk of this Court.

APRIL 2, 1981

THORNBERRY, Circuit Judge, concurring in part; dissenting in part:

ISSUED AS MANDATE: May 14, 1981

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
UNIT A & B

No. 79-2542

PANSY F. RICHARDSON, DONALD B. RICHARDSON, PATRICK S. RICHARDSON, JOSEPH S. RICHARDSON, LARRY S. RICHARDSON, CARLA RICHARDSON, and JUNE G. ALLEN,

Plaintiffs-Appellants-
Cross Appellees,

versus

FOREMOST INSURANCE COMPANY, SHIRLEY ELISER and JUNE G. ALLEN,

Defendants-Appellee,

JUNE G. ALLEN,

Defendant-Appellee-
Cross Appellant.

Appeals from the United States District Court for the Middle District of Louisiana

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ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

(Opinion April 2, 1981, 5 Cir., 1981, 641 F.2d 314).

(May 4, 1981)

Before THORNBERRY, ANDERSON and THOMAS A. CLARK, Circuit Judges.

PER CURIAM:

The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ THOMAS A. CLARK
United States Circuit Judge

Received: May 6, 1981

CLERK's NOTE:

See Rule 41 FRAP and Local Rule 17 for Stay of the Mandate

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
UNITS A & B

No. 79-2542

PANSY F. RICHARDSON, DONALD B. RICHARDSON, PATRICK S. RICHARDSON, JOSEPH S. RICHARDSON, LARRY S. RICHARDSON, and CARLA RICHARDSON,
Plaintiffs-Appellants-
Cross Appellees,

versus

FOREMOST INSURANCE COMPANY, SHIRLEY ELISER and JUNE G. ALLEN,
Defendants-Appellees,

JUNE G. ALLEN,
Defendant-Appellee-
Cross Appellant.

Appeals from the United States District Court for the Middle District of Louisiana

---

ON PETITION FOR REHEARING

(May 4, 1981)

Before THORNBERRY, ANDERSON, and THOMAS A. CLARK, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

/s/ THOMAS A. CLARK
United States Circuit Judge

Received: May 6, 1981

CLERK's NOTE:

See Rule 41 FRAP and Local Rule 17 for Stay of the Mandate

SUPREME COURT OF THE UNITED STATES

No. 80-2134

Foremost Insurance Company, et al.,
Petitioners,

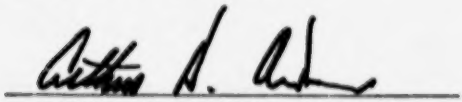
v.

Pansy F. Richardson, et al.

ORDER ALLOWING CERTIORARI. Filed October 5, 1981

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is granted.

Respectfully submitted,



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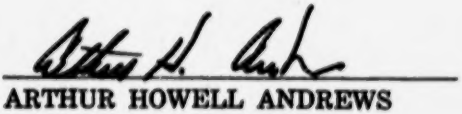
CERTIFICATE OF SERVICE

I hereby certify that three true and correct copies of the foregoing Joint Appendix have been served on the Honorable Dorsey Martin, III, Maughan, Atkinson & Martin Ltd., 1755 Wooddale Boulevard, Baton Rouge, Louisiana 70806, counsel of record for respondents, Pansy F. Richardson, Donald B. Richardson, Patrick S. Richardson, Joseph S. Richardson, Larry S. Richardson and Carla Richardson, and on the Honorable Victor L. Marcello, Talbot, Sotile, Carmouche, Marchand & Marcello, Post Office Drawer 669, Donaldsonville, Louisiana 70346, counsel of record for June G. Allen by depositing said copies in the U.S. mail, postage prepaid, this 16 day of November, 1981.

I further certify that all parties required to be served have been served.



ARTHUR HOWELL ANDREWS

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ALEXANDER L. STEVAS
CLERK

NO. 80-2134

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

FOREMOST INSURANCE COMPANY
AND SHIRLEY ELISER,

Petitioners,

versus

PANSY F. RICHARDSON, DONALD B. RICHARDSON,
PATRICK S. RICHARDSON, JOSEPH S. RICHARDSON,
LARRY S. RICHARDSON, CARLA RICHARDSON, AND
JUNE G. ALLEN,

Respondents,

On Petition for a Writ of Certiorari to the
United States Court of Appeals
For the Fifth Circuit

BRIEF BY RESPONDENTS

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NO. 80-2134

IN THE

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Respondents,

On Petition for a Writ of Certiorari to the
United States Court of Appeals
For the Fifth Circuit

BRIEF BY RESPONDENTS

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NO. 80-2134

IN THE

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PATRICK S. RICHARDSON, JOSEPH S. RICHARDSON,
LARRY S. RICHARDSON, CARLA RICHARDSON, AND
JUNE G. ALLEN,
Respondents.

BRIEF BY RESPONDENTS TO PETITION FOR CERTIORARI

The respondents, Pansy F. Richardson, Donald B. Richardson, Patrick S. Richardson, Joseph S. Richardson, Larry S. Richardson and Carla Richardson, plaintiffs-appellants below, respectfully urge that petitioners', Foremost Insurance Company and Shirley Eliser's, application for writ of certiorari to review the judgment of the U. S. Court of Appeals for the Fifth Circuit entered in the case on April 2, 1981, be denied.

STATEMENT OF THE CASE

For the sake of brevity, we adopt petitioners' statement of the case with the following exceptions or additions:

A. The collision occurred between two pleasure vehicles, one southbound and the other northbound, when, upon meeting in the river, one or both operators turned their respective boats to their left and toward each other instead of outward toward the banks of the river.

B. The collision occurred on a navigable body of water, the Amite River, at a point susceptible to commerce albeit seldom used for commercial activities.

REASONS FOR DENYING THE WRIT

When a collision occurs between two pleasure boats on navigable water susceptible to commerce and said collision results from the negligent operation of the boat or boats by the pilot or pilots in failing to observe established navigational rules and standards, then the admiralty jurisdiction of the Federal Courts should be invoked. This conclusion was reached by the United States Court of Appeals for the Fifth Circuit

and supported by the following reasons, which clearly establish the correctness of said Court's decision and the lack of necessity to grant petitioner's writ of certiorari.

I.

THE FIFTH CIRCUIT COURT OF APPEAL'S DECISION IS WITHIN THE SCOPE OF ADMIRALTY JURISDICTION AS JURISPRUDENTIALLY DEFINED.

There is no need to grand a writ of certiorari to review the decision of the Fifth Circuit Court of Appeal since that Court followed very carefully the principles expounded by this Court in Executive Jet Aviation, Inc., v. City of Cleveland, Ohio, 409 U.S. 249, 93 S.Ct. 493, 34 L.Ed.2d 454 (1972). The Fifth Circuit recognized that maritime locality alone is no longer sufficient to sustain admiralty jurisdiction and that the wrong must bear a significant relationship to traditional maritime activities. The Court correctly applied the facts of this case to said test in upholding admiralty jurisdiction, which holding does not distort traditional concepts of the scope of admiralty jurisdiction.

Counsel for petitioners seeks to have the Court define "maritime nexus" as commercial conduct (petitioners' brief, p. 20). This view would place a much greater restriction on admiralty jurisdiction than mandated by Executive Jet Aviation, Inc., v. City of Cleveland, Ohio, supra.

This Court, in Executive Jet Aviation, Inc., v. City of Cleveland, Ohio, (supra), clearly connected the traditional maritime activities of admiralty with proper regard for navigational rules when he stated as follows (p. 270):

> "The law of admiralty has evolved over many centuries, designed and molded to handle problems of vessels relegated to ply the waterways of the world, beyond whose shore they cannot go. That law deals with navigational rules — rules that govern the manner and direction those vessels may rightly move upon the waters. When a collision occurs or a ship founders at sea, the law of admiralty looks to those rules to determine fault, liability, and all other questions that may arise from such a catastrophe."

The use of a waterborne vessel on navigable waters presents a case falling within the historical scope and design of the law of admiralty. Levinson v. Deupree, 345 U.S. 648, 97 L.Ed. 1319, 73 S.Ct. 914 (1963); Just v. Chambers, 312 U.S. 383, 85 L.Ed. 903,

61 S.Ct. 687 (1941); Coryell v. Phipps, 317 U.S. 406, 63 S.Ct. 291, 87 L.Ed. 363 (1943). There is thus established precedent extending admiralty jurisdiction to pleasure boat litigation not disturbed by later decisions of this Court.

The facts presently before this Court go beyond the historical precedent in establishing a much stronger relationship to traditional maritime activities. Those facts undisputedly reveal that a collision occurred on navigable water, the Amite River, which river was indeed susceptible to commercial activity on the day and at the location of the collision. Further, although the collision occurred between two pleasure boats, it was directly caused by one or both pilots of said pleasure boats failing to observe uniformly established "Rules of the Road" for navigation on water bodies by all vessels, commercial or otherwise. The Fifth Circuit in the case of Kelly v. Smith, 485 So.2d 520 (5th Cir. 1973) established four factors to be considered in determining the applicability of maritime jurisdiction in light of the Supreme Court case of Executive Jet Aviation, Inc., v. City of Cleveland, Ohio, (supra). Those factors were as follows:

1. The function and role of the parties;
2. The types of vessels and instrumentalities involved;
3. The causation of the types of injury; and
4. The traditional concept of the role of admiralty law.

In the instant case, an analysis of these factors in light of the factual situation of this case reveals a clear nexus to traditional maritime activities. In regard to the functional rule of the parties, all were actively engaged in navigation of the vessels. Secondly, although both vessels were pleasure boats, no non-navigable vessels or instrumentalities were involved in the collision. Thirdly, the injuries complained of by all parties resulted from the disregard of rules for proper navigation. Lastly, admiralty has traditionally been concerned with furnishing remedies for those injured while traveling navigable waters. See Kelly v. Smith, (supra); St. Hilaire Moye v. Henderson, 496 F.2d 973 (8th Cir. 1974).

There is a compelling federal interest in protecting navigation and commerce on navigable waters establishing a significant relationship to traditional

maritime activities. The Fifth Circuit is not alone in its recognition of this principle. Other circuits and federal district courts are in accord. In Oppen v. Aetna Insurance Co., 485 F.2d 262 (9th Cir. 1973), damage by an oil spill in the Santa Barbara Channel to a pleasure boat was cognizant in admiralty jurisdiction. The Fourth Circuit in Richards v. Blake Builders Supply, 528 F.2d 745 (4th Cir. 1975) held that the negligent claim of a plesure boat passenger was cognizable in admiralty. In Kayfetz v. Walker, 404 Fed. 75 (D.C. Conn. 1975), the Court upheld admiralty jurisdiction where the injuries complained of arose out of a collision between two sailing yachts during a race, which also resulted from disregard of the rules of proper navigation. The district court in Gilmore v. Witschorek, 411 F.Supp. 491 (E.D. Ill. 1976) also held that federal admiralty jurisdiction encompassed a collision between two pleasure boats on navigable water in a wrongful death claim. Finally, in Luna v. Star of India, 356 F.Supp. 59 (S.D. Cal. 1973), an accident occurring on a historic vessel used as a museum established a sufficient relationship to traditional maritime activities to invoke federal court admiralty jurisdiction.

It is suggested that the proper focus of the maritime law should be upon waterborne vessels, pleasure or otherwise, rather than upon waterborne commerce alone. This is true because there is a federal interest in protecting navigation and commerce on navigable waters since waterborne vessels, whether commercial or non-commercial, clearly create a potential threat to navigation and commerce. Admiralty Jurisdiction Over Pleasure Craft Torts, 36 Maryland L.R., p. 225.

II.

THE FIFTH CIRCUIT DECISION PROMOTES COMMERCE AND SAFE NAVIGATION THROUGH UNIFORMITY OF NAVIGATIONAL RULES AND MAKES THE JURISDICTION READILY ASCERTAINABLE TO LITIGANTS AND COURTS.

In addition to a nexus existing between traditional concepts of maritime activities in a collision involving failure to apply proper navigational rules, policy consideration militates toward upholding admiralty jurisdiction in the present case. This policy stems from the national interest in uniformity of navigational laws and judicial remedy for those subjected to the hazards of waterbound transportation

on our navigable rivers — the "highways of admiralty." As stated most clearly in the case of St. Hilaire Moye v. Henderson, (supra), p. 979:

> "The navigation of waterbound vessels on those waters, even if not directly engaged in commerce themselves, present a potential danger to the operation of vessels which are engaged in commerce on those waters. This is the very basis of law requiring vessels used on navigable waters to meet certain safety and operational standards. The law of admiralty must surely cover the operation of vessels which present potential danger to commerce on navigable waters."

Federal law has for many years subjected pleasure craft to statutory navigational and safety rules. 1 U.S.C. §3 (1970); 33 U.S.C. §§151-232 (1957); 33 U.S.C. §§241-295 (1958); 33 U.S.C. §§302-356 (1958); and 46 U.S.C. §526 (1940). The enactment of these laws and their applicability to all types of vessels show a need for uniformity of said rules on all navigable waterways for the enhancement of commerce as recognized by Congress. The exclusion of pleasure boats from admiralty tort jurisdiction while keeping said boats under federal navigational rules would frustrate a recognized federal policy and federal interest in protection of navigation on navigable

waters. Admiralty Jurisdiction Over Pleasure Craft Torts, 36 Md. L.R., p. 229.

If all collisions between vessels on navigable waters are held to be within admiralty jurisdiction, then uniformity of navigational rules is guaranteed and commerce is unimpeded. Without the same uniformity of law for all vessels, each individual state would be free to regulate its own rules, which could conflict with federal navigational laws.

If this Court were to believe petitioners and establish the requirement that in order for admiralty jurisdiction to be invoked a commercial vessel must be involved in the collision, all types of conflicts and uncertainties could arise. For collisions involving non-commercial navigators, there would be fifty different sets of navigational rules whose applicability would depend upon the location of said vehicle in reference to the territorial jurisdiction of each state within the United States. There could be different sets of navigational rules for such non-commercial vessels on the same navigable bodies, i.e., the Mississippi River, depending upon what state you happen to be in at the time of the mishap.

With different rules for commercial vessels (federal rules) as opposed to non-commercial vessels (state rules), it might not be readily ascertainable prior to the collision as to the exact nature of each vessel's activities, commercial or pleasure, and thus what proper navigational rules would govern the situation. Havoc would result. The correct rule of navigation would not be applied by the parties prior to a collision in an effort to avoid same but would be applied only upon a determination by the court at trial after the collision as to whether such vessel's activities later turned out to be sufficiently commercial so as to involve a federal navigational rule or purely pleasurable, thus invoking state rules of navigation. In order to keep the roads of admiralty free for commerce without restraint, it is imperative that uniform admiralty law extend to non-commercial as well as to commercial navigators.

Even Professor Stoltz, who is quoted extensively by petitioners in the application for writ of certiorari, recognized the need for uniformity in navigational rules when he stated as follows regarding the scope of admiralty jurisdiction:

> "Clearly a federal interest exists with respect to such matters as the rules of navigation, right-of-way, and lights to be carried, which must necessarily control both big ships and little boats and as to which there is a clear virtue in national uniformity."

Pleasure Boating and Admiralty: Erie At Sea, 51 Cal. L.R., p. 663.

> "The easiest case for an application of federal law to pleasure boating involves the Rules of the Road: such as rules of passing and turning, rules of right-of-way, and rules concerning running lights. By the terms of a federal statute, these rules are applicable to all vessels on navigable waters, and the rules of must of necessity be applicable to pleasure boats. It would be intolerable to have conflicting rules on any particular body of water."

Pleasure Boating and Admiralty: Erie At Sea, 51 Cal. L.R., pp. 712-713.

Although the facts of this case do not establish clearly whether the Amite River was being used in commerce on the date of the collision and at the point of collision, said factors should not affect the Court's determination of admiralty jurisdiction, provided the waterway, as here, is admittedly susceptible to commerce. The Daniel Ball, 77 U.S. (10 Wall.) 557, 563, 19 L.Ed. 999 (1870).

As stated by the Fifth Circuit in its decision (J.A. "A" - 6A), it would be introducing another note of uncertainty to hold that admiralty jurisdiction extends only to stretches of navigable water that presently functions as a commercial artery. It would place too great a burden on pilots of navigable bodies to ascertain commercial activities at each point during navigation. Without this determination under such a rule and with difference between state navigation rules and the admiralty "Rules of the Road," the correct navigable rule would again be resolved only in court after litigation, which would produce absolute chaos for said pilots and would place additional restraints on commercial activities.

> "It would be highly inconsistent to have created a separate body of law for maritime commerce in order to provide uniformity and predictability for its legal affairs because those affairs are primarily interstate and international, and at the same time exclude vessels having the same extent of operations simply because those operations are not for profit."

Admiralty Jurisdiction Over Pleasure Craft Torts, 36 Md. L.R., p. 278.

CONCLUSION

There is no necessity that a writ of certiorari be granted. The Fifth Circuit Court of Appeals' decision upholding admiralty jurisdiction in this case does not stretch or distort long-established principles of maritime law. The admiralty law has traditionally been concerned with furnishing remedies for those injured while traveling navigable waters. In addition, policy consideration of uniformity of navigational laws for all vessels facing the hazards of the roads of admiralty and policy assuring a readily ascertainable jurisdiction militates toward upholding admiralty jurisdiction for all vessels colliding on navigable waters which are susceptible to commerce. Petitioners' application for writ of certiorari should be denied.

In the alternative, this Court should issue a summary opinion upholding the Fifth Circuit's decision in accordance with law and with the rules of the Supreme Court of the United States.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that three true and correct copies of the foregoing Brief in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit has been served on the Honorable Howell Andrews, P. O. Box 3958, Baton Rouge, LA 70821, counsel of record for petitioners, Foremost Insurance Company and Shirley Eliser, and on the Honorable Victor Marcello, P. O. Drawer 669, Donaldsonville, LA 70346, counsel of record for June G. Allen, by depositing said copies in the United States mail, postage prepaid and properly addressed, on this 14th day of September, 1981.

DORSEY C. MARTIN, III

Office - Supreme Court, U.S.
FILED
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ALEXANDER L. STEVAS
CLERK

No. 80-2134

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

FOREMOST INSURANCE COMPANY AND SHIRLEY ELISER,

Petitioners,

versus

PANSY F. RICHARDSON, DONALD B. RICHARDSON, PATRICK S. RICHARDSON, JOSEPH S. RICHARDSON, LARRY S. RICHARDSON, CARLA RICHARDSON AND JUNE G. ALLEN,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF PETITIONERS

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QUESTION PRESENTED

Whether the admiralty jurisdiction of the Federal Court should be extended to accidents occurring between purely recreational boats in which there is absolutely no commercial or traditional maritime activity involved.

LIST OF PARTIES PURSUANT TO RULE 28.1

1. Petitioners: Foremost Insurance Company[1] and Shirley Eliser. (Defendants-Appellees, below)

2. Respondents: Pansy F. Richardson, Donald B. Richardson, Patrick S. Richardson, Joseph S. Richardson, Larry S. Richardson and Carla Richardson. (Plaintiffs-Appellants, below)

3. Respondent: June G. Allen. (Defendant-Appellee, below)

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1. Foremost Insurance Co. is a wholly owned subsidiary of Foremost Corporation of America. Foremost Corporation of America also owns Tuloka Affiliates, Inc., Foremost Home Service Corporation and Access Control Systems, Ltd. Foremost Insurance Co. owns in whole or in part Foremost Guaranty Corporation, Foremost Life Insurance Company, Foremost Financial Services Corporation, Foremost Home Brokers, Inc., Centennial Park Hotel Corporation and Foremost Affiliated Insurance Services, Inc. It is affiliated with Foremost County Mutual Insurance Company and has an indirect financial interest in Minnehoma Insurance Company and M.A.G. Agency, Inc.

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Benedict, I *Benedict on Admiralty*, 9-5 (7th Ed. 1980) 19

2 E. Benedict, *The Law of American Admiralty* (7th Ed. 1975) 13

Calamari, *The Wake of Executive Jet—A Major Wave Or A Minor Ripple*, IV, *The Maritime* Lawyer 52 (1979) 11, 13

Gilmore and Black, *The Law of Admiralty* (2nd Edition) 11

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Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF PETITIONERS

OPINIONS BELOW

The opinion of the Court of Appeals is reported as *Richardson v. Foremost Ins. Co.*, 641 F.2d 314 (5th Cir. 1981). It is set out in the Joint Appendix at page 33. The per curiums denying the application for rehearing and applications for rehearing en banc are reported at 646 F.2d 566 (5th Cir. 1981) and are set out at pages 42 and 43 of the Joint Appendix. The opinion of the District Court can be found at 470 F.Supp. 699 (M.D. La. 1979) and has been set forth at pages 19 through 29 of the Joint Appendix.

JURISDICTION

This Court has accepted jurisdiction pursuant to 28 U.S.C. 1254(1). The Honorable Fifth Circuit Court of Appeals entered judgment on April 2, 1981. (Joint Appendix, page 39) Motions for rehearing and rehearing en banc were timely filed on April 15, 1981 (Joint Appendix, page 4) and denied by the Court of Appeals on May 4, 1981 (Joint Appendix, page 4). The petition for certiorari was filed on June 15, 1981 and granted by this Honorable Court on October 5, 1981.

CONSTITUTIONAL PROVISIONS AND STATUTES

I.

Article III, Section 2 of the United States Constitution is set out in full at page 22 of the jurisdictional appendix and reads in pertinent part as follows:

> Section 2. The judicial power shall extend to all cases, in Law and Equity, arising under this Constitution, the laws of the United States, and Treaties made, or which shall be made, under their Authority; to all cases affecting ambassadors, or public

ministers and consuls, to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more states; between a State and Citizen of another state; between citizens of different states; between citizens of the same state claiming lands under grants of different states and between a state, or the citizens thereof, and foreign states, citizens or subjects.

II.

28 U.S.C. 1254 is set out verbatim in the jurisdictional appendix at page 23 et seq.

III.

28 U.S.C. 1333 is set out in full at pages 23 and 24 et seq. of the jurisdictional appendix.

IV.

33 U.S.C. 154 is set out in full at page 24 et seq. of the jurisdictional appendix.

V.

24 U.S.C. 740 is set out in full at pages 24 and 25 of the jurisdictional appendix.

VI.

L.S.A. R.S. 22:658 is set out in full at page 25 of the jurisdictional appendix.

STATEMENT OF THE CASE

The complaint asserts that on April 25, 1976, Clyde Richardson was killed in a boating accident which occurred on the Amite River some ½ to ¾ of a mile south of the French Settlement Bridge near that village in Louisiana. (J.A. 5) Suit was commenced on September 15, 1976 on behalf of decedent's wife and major children against June Allen, allegedly the operator of the boat in which decedent was a passenger, and Shirley Eliser, the driver of the boat which collided with the boat supposedly operated by June Allen, and Foremost Insurance Company and Shirley Eliser, pursuant to L.S.A. R.S. 22:658(2), Louisiana "Direct Action Statute." (Jurisdictional Appendix, page 25)

June Allen answered the complaint admitting the death and location of the occurrence, but denying all else. Combined with her answer, Mrs. Allen brought a counter claim against the original complaints and a cross-claim against Ms. Eliser and Foremost Insurance Company asserting that she was in fact a passenger in the boat operated by Clyde Richardson and that she received certain injuries in the collision as a result of the combined negligence of Clyde Richardson and Shirley Eliser. (J.A. 8)

After extensive discovery, Shirley Eliser and Foremost Insurance Company answered admitting the death, but denying the other allegations of the complaint. Your Petitioners further asserted affirmatively that the sole cause of the collision was the negligent operation of the boat being driven by either June Allen or Clyde Richardson as a result of lack of skill and/or intoxication by both occupants. (J.A. 13) Your Petitioners further asserted affirmatively the Federal Court's lack of subject matter jurisdiction in the premises in that the facts did not present a case of admiralty

or maritime jurisdiction and that further diversity was missing. (J.A. 14)

June Allen had attempted to amend her counter-claim and cross-claim to assert diversity as an additional jurisdictional ground, (R. 52) but her motion to amend was denied on August 11, 1977, since she was a Louisiana resident at the time of the occurrence. After Mrs. Allen's suit of mandamus to the United States Court of Appeals, Fifth Circuit was denied (R. 70), she dismissed her cross-claim against Shirley Eliser and Foremost Insurance Company without prejudice (J.A. 16) and filed a new action in State District Court.

At a status conference held before the United States Magistrate, Frank J. Polozola, on March 14, 1978, the Court on its own motion addressed the issue of subject matter jurisdiction and ordered briefs supported by affidavits or depositions filed. (J.A. 17) All parties submitted such memoranda supported by all depositions taken, as well as various documentary evidence from the U.S. Corps of Engineers and the Louisiana Department of Transportation and Development as to the navigability of the Amite River at the site of the collision and its use as a commercial artery. (R. 81-83, 90-119, 136-139) By minute entry dated August 11, 1978, Magistrate Polozola found that, based upon the evidence then before the Court, the Court had admiralty jurisdiction but reserved the Court's right to re-examine the jurisdictional question. (J.A. 18)

Pre-trial conference was held before the Honorable E. Gordon West, Judge, United States District Court, Middle District of Louisiana on December 5, 1978. (R-125) Again, the Court on its own motion reconsidered the jurisdictional questions and supplemental briefs on the issue were submitted. The Court found, for written reasons assigned dated

May 23, 1979, that admiralty jurisdiction was in fact lacking and dismissed the complaint of the Richardson heirs. (J.A. 19)

The District Court found these facts to be undisputed:

"(1) One boat was used for pleasure boating, such as boat riding and water skiing, and at the time of the accident, the boat was actually pulling a skier on a zip sled;

(2) The other boat was used exclusively for pleasure fishing and was described as a bass boat;

(3) Neither boat had ever been used in a 'commercial maritime activity' before the accident;

(4) At the time of the accident neither boat was involved in any 'commercial maritime activity' of any sort;

(5) Neither of the two drivers of the boats were being paid to operate the boat, nor was this activity in any way a part of their regular type of employment;

(6) None of the passengers on either boat were engaged in any kind of 'traditional maritime activity', either before or at the time of the accident;

(7) Neither of the boats involved were under hire in any traditional maritime form;

(8) There is no evidence to indicate that any 'commercial activity,' even in the broadest admiralty sense, had ever been previously engaged in by either of the boats in question, and in fact the two boats would have to be classified as 'purely pleasure craft', not in any way 'involved in commerce'; and,

(9) There is no other instrumentality involved in

> this accident that had even a minor relationship to 'admiralty' or 'commerce'; i.e. a buoy, barge, oil drilling apparatus, etc." (J.A. 20 and 21)

The District Court relied upon three cases which controlled its decision — *Executive Jet Aviation, Inc. v. City of Cleveland, Ohio*, 409 U.S. 249, 93 S.Ct. 493, 34 L.Ed.2d 454 (1972); *Kelly v. Smith*, 485 F.2d 620 (5th Cir. 1973) and *Peytavin v. Government Employees Insurance Co.*, 453 F.2d 1121 (5th Cir. 1972). The District Court interpreted these decisions to require more than a maritime locus to support the Federal Court's maritime jurisdiction, that "plus" being that the complained of occurrence have some "commercial" or "traditional maritime" connection. (J.A. 28) Finding no such connection in the instant controversy, the District Court dismissed the complaint for want of subject matter jurisdiction on May 23, 1979. (J.A. 30)

The Richardson heirs filed notice of appeal and posted bond on June 19, 1979. (J.A. 31) June Allen filed her notice of appeal on June 21, 1979 and posted bond on June 21, 1979. (J.A. 32)

The United States Court of Appeal, Fifth Circuit, for written reasons dated April 2, 1981, reversed and remanded. (J.A. 33) Although that Court agreed with the District Judge's formulation of the rule to support subject matter jurisdiction, it disagreed with the application of the rule to the facts presented. That Court abandoned any requirement that the complained of activity have any connection to commerce and did not imply any commercial requirement in defining "traditional maritime activity" and held:

> "We hold that two boats, regardless of their intended use, purpose, size, and activity, are engaged in traditional maritime activity when a collision between them occurs on navigable waters." (J.A. 35)

Your Petitioners filed motions for rehearing and rehearing en banc on April 15, 1981 (J.A. 4) which were denied on May 4, 1981 (J.A. 41 and 43).

Petition for Certiorari was filed with this Court on June 15, 1981 and was granted on October 5, 1981. (J.A. 45).

In reversing the District Court, the Court of Appeals was ". . . strongly influenced by the holding in *Kelly v. Smith*, supra, in which (the Fifth Circuit) stated that '(a)dmiralty has traditionally been concerned with furnishing remedies for those injured while traveling navigable waters'." (J.A. 36) It based its opinion on the fact that the "Rules of the Road" apply to all boats, regardless of size and usage, traversing navigable waters. (J.A. 35) We submit that this Court has mandated some "commercial" connection to the location of the wrong in *Executive Jet, Inc. v. City of Cleveland, Ohio*, supra and that such mandate cannot be ignored merely because the "Rules of the Road" might govern the litigants' conduct.

SUMMARY OF ARGUMENT

The Court of Appeal erred when it found that a collision between two non-commercial pleasure craft occurring on a non-commercial inland waterway supported the exercise of admiralty jurisdiction by the federal courts. *Executive Jet Aviation, Inc. v. City of Cleveland, Ohio*, 409 U.S. 249, 93 S.Ctt. 493, 34 L.Ed.2d 454 disapproved of the "strict locality" rule of admiralty jurisdiction and requires in addition to location on navigable waters that the wrong have some reasonable connection with commerce and maritime navigation. Since this collision occurred on an inland waterway that is not used nor likely to be used for commercial maritime activities and since the vehicles and parties involved have no con-

nection with commercial maritime activities, then the collision is of only local significance and does not warrant the invocation of federal admiralty jurisdiction as a matter of federal-state comity.

ARGUMENT

The record fairly reflects and there is no dispute between the parties that this case involves a collision between two pleasure craft "in the purest sense of the word." (J.A. 21) As found by the District Court, immediately prior to the collision, Shirley Eliser was operating an 18 foot pleasure boat used exclusively for "pleasure boating" in a southerly direction on the Amite River approximately ½ to ¾ mile downstream from the French Settlement Bridge. (J.A. 19) The other boat was a 16 foot "bass boat" powered by an outboard motor which was heading in a northerly direction upstream. (J.A. 19) There is no real dispute that the bass boat made a left turn maneuver into the path of the southbound pleasure boat. (J.A. 19)

It is hotly contested between the heirs of Clyde Richardson and June Allen whether the decedent or Mrs. Allen was operating the bass boat at the time of the collision (J.A. 5 and 8); but for the purposes of the jurisdictional question presented, the identity of the operator is not relevant, since neither of these parties was engaged in any maritime commercial activity with the bass boat or any other boat.

The District Court has never decided to what extent the Amite River at the point of collision was subject to commercial activity or actually being used for such activities, although the Court of Appeals recognized ". . . from the record that the place where the accident occurred is seldom, if ever, used for commercial activity." (J.A. 36)

As found by the District Court these facts are undisputed:

"(1) One boat was used for pleasure boating, such as boat riding and water skiing, and at the time of the accident, the boat was actually pulling a skier on a zip sled;

(2) The other boat was used exclusively for pleasure fishing and was described as a bass boat;

(3) Neither boat had ever been used in a 'commercial maritime activity' before the accident;

(4) At the time of the accident neither boat was involved in any 'commercial maritime activity' of any sort;

(5) Neither of the two drivers of the boats were being paid to operate the boat, nor was this activity in any way a part of their regular type of employment;

(6) None of the passengers on either boat were engaged in any kind of 'traditional maritime activity', either before or at the time of the accident;

(7) Neither of the boats involved were under hire in any traditional maritime form;

(8) There is no evidence to indicate that any 'commercial activity,' even in the broadest admiralty sense, had ever been previously engaged in by either of the boats in question, and in fact the two boats would have to be classified as 'purely pleasure craft', not in any way 'involved in commerce'; and,

(9) There is no other instrumentality involved in this accident that had even a minor relationship to 'admiralty' or 'commerce'; i.e. a buoy, barge, oil drilling apparatus, etc." (J.A. 20 and 21)

Given this factual background and especially in light of the location of the accident we submit the United States Court of Appeals for the Fifth Circuit erred, as a matter of law, in finding that federal courts do have admiralty subject matter jurisdiction over this claim.

The question presented is "whether the admiralty jurisdiction of the federal courts should be extended to accidents occurring between purely recreational boats in which there is absolutely no commercial or traditional maritime activity involved." We would answer the question in the negative.

There is now uniform agreement between the Courts and commenators that the admiralty jurisdiction of the federal courts emanated from the conviction of the members of the Constitutional Convention that there was a need for a uniform body of laws, in general harmony with the laws of other maritime nations, for the conduct of the commercial shipping trade. Regulation of the shipping industry was close to the conduct of foreign affairs, and those engaged in the industry were thought to have a need for predictability for their rights and liabilities. The Courts' admiralty jurisdiction was created to serve commercial shipping interests by providing a uniform body of law for the resolution of legal disputes arising among those engaged in that industry without being hampered by particular laws of local ports.[2]

There is no compelling need for a uniform body of laws to govern the use of small privately owned and operated water craft used entirely for pleasure boating and pleasure fishing. As pointed out by Professor Stoltz in his often quoted article

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2. For a discussion of the historical development of the role of admiralty jurisdiction, see: Chapter 1, Gilmore and Black, **The Law of Admiralty** (2nd Edition); Stoltz, **Pleasure Boating and Admiralty, Erie at Sea**, 51 Cal.L.Rev. 661; Calamari, **The Wake of Executive Jet—A Major Wave Or A Minor Ripple, IV, The Maritime Lawyer** 52 (1979).

> "Commerce and uniformity go together. There is virtue in having the same rules applied to ships and their cargoes moving from port to port: uniformity promotes the free movement of trade by increasing the confidence of merchants in their ability to conduct business successfully. That, and no more, seems to have been what the framers had in mind in granting civil admiralty jurisdiction to the federal courts. But where commerce stops, the need for uniformity also ends. If commerce is not involved, there is no national interest in uniformity and there is every reason associated with federalism for local power to govern events occurring locally that have only local impact." Supra, 51 Cal.L.Rev. at 671.

Indeed, when the Court in *The Daniel Ball*, 77 U.S. (10 Wall.) 557 (1870) defined "navigable waters of the United States" over which federal courts could exercise admiralty jurisdiction, it demonstrated an awareness of the basic connection between admiralty and commerce when it said:

> "Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade or travel on water. And they constitute navigable contradistinction from the navigable waters of the states, when they form in their ordinary condition by themselves, or by uniting with other waters a continued highway over which commerce is or may be carried on with other states or foreign countries in the customary modes in which such commerce is conducted by water." 77 U.S. 557, 563.

The so-called "strict locality" test of maritime jurisdiction had its genesis in *The Plymouth*, 70 U.S. (3 Wall.) 20

(1865) when Mr. Justice Story, as the spokesman for the Court, pronounced in substance that every type of tort occurring upon navigable waters, whether or not on a vessel, would support federal admiralty jurisdiction. Although *The Plymouth* has been legislatively overruled somewhat by Congress when it first enacted The Extension of Admiralty Act, 46 U.S.C. §740 (1970), the decision did serve as the cornerstone of the development of admiralty jurisdiction. Although early commentators and Courts suggested a maritime nexus in addition to location might be required to support jurisdiction, such nexus never developed much weight. And over time, location became axiomatic with jurisdiction. Calamari, supra. IV *The Maritime Lawyer* 52.

The automatic application of "strict locality" by the Courts was easy, but it often lead to absurd results as recognized by this Court in *Executive Jet Aviation, Inc. v. City of Cleveland, Ohio*, 409 U.S. 249, 93 S.Ct. 493, 34 L.Ed.2d 454 (1972). While the facts of that case involved an airplane crash, and the actual holding was so restricted, much of the opinion discussed this Court's dissatisfaction with the "strict locality" test as a basis for admiralty jurisdiction in all tort actions.

We take the position as most commentators and Courts[3] have that *Executive Jet* does require something more than a fortuitous event occurring on navigable waters to support jurisdiction in all "species of torts"; that additionally the events must have some rational basis to traditional concepts of maritime commerce or navigation.

Since this Court in *Executive Jet*, district and appellate courts have experienced considerable difficulty in deciding

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3. See Calamari, supra., IV The Maritime Lawyer 52 (1979), 2 E. Benedict, The Law of American Admiralty (7th Ed. 1975); Stoltz, supra., 51 Cal.L.Rev. 661 (1963).

the jurisdictional bases in claims arising out of pleasure boating collisions and inconsistent decisions resulted. The Fourth Circuit in *Crosson v. Vance*, 484 F.2d 840 (4th Cir. 1973), clearly approved of Professor Stoltz's conclusion that admiralty jurisdiction should not be exercised over claims arising from pleasure boating accidents. That case, however, dealt with a claim by an injured water skier against the operator of the tow boat for injuries arising out of the operator's alleged operation of the vessel. The Court was able to base its findings of no admiralty jurisdiction, however, on this Court's specific disapproval of *King v. Testerman*, 214 F.Supp. 335 (E.D. Tenn., 1963) in *Executive Jet*.

In a later decision by the same Court, *Richards v. Blake Builders Supply, Inc.*, 528 F.2d 745 (4th Cir. 1975), the Court again expressed apparent belief that local pleasure boating claims should not be subject to admiralty jurisdiction, but the Court was obviously reluctant to so hold in light of its uncertainty as to the application of *Executive Jet* to pleasure boating claims.

In *Kelly v. Smith*, 485 F.2d 520 (5th Cir. 1973), the Fifth Circuit set forth contain factors to be considered in determining whether admiralty jurisdiction should apply to a particular case. The Court reasoned at page 525:

> "From the facts and analysis of *Executive Jet* and *Peytavin*, we can discern factors to be considered in the circumstances before us: the functions and roles of the parties; the types of vehicles and instrumentalities involved; the causation and the type of injury; and the traditional concepts of the role of admiralty law."

Kelly v. Smith, supra, involved a cause wherein rifle fire was directed from an island in the Mississippi River at a small

pleasure boat that was fleeing the island after its occupants had poached deer. The Court found in that case that it could hear that case under its admiralty jurisdiction stating at page 526:

> "Rifle fire directed at a vessel, albeit a small one, on a major commercial artery, and injuring the pilot, presents sufficient danger to maritime commerce for the federal courts of admiralty to assume jurisdiction and to furnish remedies to those aboard the vessel and injured by that conduct. Regardless of whether the Kellys had available remedies in state courts, the federal interest in protecting navigation on the Mississippi River overrides any consideration of federal-state comity or conflicts of interest."

In *Kelly*, the Court recognized that the complained of conduct presented a clear danger to maritime commerce because it affected navigation on a "major commercial activity." Judge Morgan wrote a strong dissent in *Kelly*. He would have found no jurisdiction because the case presented a matter of strictly local concern as a matter of state comity and would have deferred to the strong interest the State of Mississippi had over the conduct of the litigants.

Kelly, in our mind, factually approaches the extreme view that a Federal Court should take in defining jurisdiction. We are not highly critical of the decision because it does recognize implicity that the conduct have some relationship to commerce. Note that the Court gave great weight to the fact that the occurrence took place on the Mississippi River, no doubt a very major commercial artery.

The District Court also analyzed *Kelly*:

> "Most importantly to this case, the discussion in the *Kelly* case indicated that there was either some 'commercial activity or some traditional maritime connec-

> tion' present to invoke admiralty jurisdiction. It seems clear from the facts in *Kelly* that the case dealt, at least to some degree, with what this court might term 'piracy' in that the plaintiffs were admittedly poaching on the land which the defendant, J. C. Smith, had been hired to protect." (J.A. 26)

The Fifth Circuit was strongly influenced by *Kelly*, but did not read the decision to require any connection whatsoever between the occurrence and commerce. The Court states at J.A. 36:

> "Our decision in this case is strongly influenced by the holding in *Kelly v. Smith*, supra, in which this Court stated that '(a)dmiralty has traditionally been concerned with furnishing remedies for those injured while travelling navigable waters."

Surely, the Fifth Circuit cannot mean that simply because some federal courts have in the past recognized admiralty jurisdiction over accidents involving pleasure craft, that it is bound to do so in the present action. If this is the case, then this Court's pronouncement in *Executive Jet* is meaningless to litigation other than aviation cases. We simply do not believe this Court meant for the ruling to stop there.

Where we do take issue with the Fifth Circuit is in the abandonment of any commercial connection to the occurrence or location. The Court discussed various problems which it felt would be exacerbated by requiring commercial flavor to the conduct. It went on to state at J.A. 36:

> "Only a uniform admiralty law, extending to non-commercial as well as commercial navigation, avoids these problems."

The Court went on to discuss to location of the wrong:

> "We note additionally from the record that the place

> where the accident occurred is seldom, if ever, used for commercial activity. That does not cause us to vary from our holding. The waterway is not landlocked. It would be introducing another note of uncertainty to hold that admiralty jurisdiction extends only to a stretch of navigable water that presently functions as a commercial artery." (J.A. 36 and 37)

We would submit that by abandoning the requirement of some connection between the place, wrong and commerce, the Lower Court is in effect attempting to retreat to the pre-*Executive Jet* "strict locality" test. We believe this to be in violation of this Court's mandate as well as the opinion of at least other panels within the Fifth Circuit itself.

In the recent case of *Sohyde Drilling & Marine Co. v. Coastal States Gas Producing Co.*, 644 F.2d 1132 (5th Cir. 1981), the plaintiff filed suit for property damages arising out of a blowout of its high pressure gas well which occurred while defendant was performing workover operations from its submersible drilling platform, which, at the time, was resting on the bottom of a dead-end canal slip in Louisiana. The Fifth Circuit found that the District Court had improperly assumed jurisdiction and held that for an action to lie under the Admiralty Extension Act, the injury complained of must bear a significant relationship to maritime activity. The Court stated at page 1136:

> "The (Admiralty Extension Act) was not intended to grant claimants new substantive rights of recovery nor relieve them from jurisdictional constraints unrelated to locality—a la Executive Jet—imposed on general maritime tort claimants. Accordingly, we find claims under the Admiralty Extension Act to be subject to the 'maritime relationship' rule of *Executive Jet*."

We submit that the "maritime relationship" is something more than the mere fact that the occurrence happened on navigable water and it is evident that even within the Fifth Circuit this argument prevails.

Our appreciation of the jurisprudential pattern, including *Kelly v. Smith*, supra, and federal/state comity viewed in the light of the need for uniform laws only as they relate to commerce or shipping dictates a balancing of location with commercial nexus. As location becomes less relevant to maritime commerce, the activity complained of must have a closer relationship to commerce - (commercial) conduct + (commercial) location = admiralty jurisdiction. If we examine *Kelly v. Smith*, supra, we find that the strong reliance the Court placed upon the location of the wrong, the Mississippi River, and the concomitant danger to navigation even a small boat presents on that waterbody to maritime commerce, justified a conclusion of admiralty jurisdiction. Application of the formula to the case at bench would not support jurisdiction because the operation of the boats had no relationship to commerce in even the slightest degree and the location of the occurrence was essentially commercially insignificant. Surely in this action, federal jurisdiction interest created and expanded to regulate the shipping industry should give way to Louisiana's right to regulate purely pleasure boating occurrences on an insignificant inland waterway.

The District Court Judge recognized this notion when he stated at J.A. 26:

> "When the location of the injury is on or in a navigable waterway, the requirement of a 'traditional maritime connection' becomes less stringent. In *Kelly v. Smith*, supra, the poaching or piracy, with its commensurate miniwar between the parties in a stretch of the Mississippi River, which is conclusively navi-

gable, was enough to trigger the admiralty jurisdiction of the federal court. However, in the case at bar this court can find no 'traditional maritime connection' between the injuries received and the location of the tort. Admiralty jurisdiction was created to serve the commercial shipping industry's interests by providing a stable and constant body of law which is to be used in the resolution of litigation arising between those people actually engaged in it. The tremendous increase in the number of small pleasure boats, whether for skiing or pleasure fishing, is a contemporary problem. When the owners of these watercrafts have absolutely no commercial or traditional maritime interests which require the protection of the admiralty side of the federal judiciary, then admiralty jurisdiction should be withheld. In this context Professor Stoltz feels that the operation of small pleasure craft is so 'local' in nature that a uniform body of law is a detriment and that instead, the jurisdiction of these cases should be transferred to the states."

This is also the view taken by Benedict when he states:

"In the Executive Jet Aviation, Inc. v. City of Cleveland, the Supreme Court, while affirming that the traditional view of the court was that maritime tort jurisdiction was governed by locality, did not in fact advert to the historical reason underlying the rule.

The final decision is, it is submitted, valid in the light of the considerations pointed out above. It is only in the primary locale of admiralty, that is, on the high seas, that jurisdiction in tort is not dependent on any relationship with commerce and navigation. In the secondary locale, namely inland navigable waters, admiralty jurisdiction is attracted in cases of tort only when such tort has a significant relationship to shipping and navigation." Benedict, I *Benedict on Admiralty*, 9-5 (7th Ed. 1980)

The Court of Appeal felt that admiralty jurisdiction should be invoked merely because the federal "Rules of the Road" would be used as a test of negligence. There is no impediment to the application of those rules by the state courts. In fact, state courts are not only allowed, but are mandated, to enforce federal statutes relating to navigation and are to give those rules the same construction as they are given by federal courts sitting in admiralty. *Carlin v. New York N.H. & H.R. Co.*, 1911, 130 N.Y.S. 828; *Chesley v. Nantasket Beach Steamboat Co.*, 1901, 61 N.E. 50, 179 Mass. 469, 33 U.S.C.A. 154.

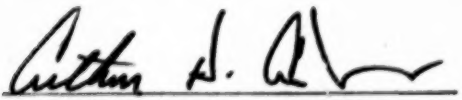
The lower court majority recognized that the record in this case indicated that the Amite River was seldom, if ever, used for commercial activity. (J.A. 36) As pointed out in *Adams v. Montana Power Co.*, 528 F.2d 437 (9th Cir. 1975), admiralty jurisdiction does not extend to a tort claim arising in waters "traversed" by small pleasure craft only, "where no commercial shipping occurred or was likely to occur." Accord: *Chapman v. United States*, 575 F.2d 147 (7th Cir. 1978) and *Livingston v. United States*, 627 F.2d 165 (8th Cir. 1980).

CONCLUSION

The Fifth Circuit Court of Appeals erred in finding that the facts of this case supported the exercise of admiralty jurisdiction. A collision between two pleasure craft, whose exclusive use is and has been recreational, on a small inland river which, though navigable in the strictest sense, is not used for nor likely to be used for commercial maritime activities is of such a local nature that federal courts do not have admiralty jurisdiction to hear tort claims arising out of such collision. Petitioners are entitled to a judgment reversing the judgment of the Court of Appeals entered April 2, 1981 and entering judgment in favor of Shirley Eliser and Foremost

Insurance Company and against Pansy F. Richardson, Donald B. Richardson, Patrick S. Richardson, Joseph S. Richardson, Larry S. Richardson and Carla Richardson dismissing their complaint for want of subject matter jurisdiction.

Respectfully submitted,



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JURISDICTIONAL APPENDIX

CONSTITUTIONAL PROVISIONS AND STATUTES

I.

U.S. Constitution, Article III.

Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, or public Ministers and Consuls; — to all Cases of admiralty and maritime Jurisdiction; — to Controversies to which the United States shall be a Party; — between a State and Citizens of another State; — between Citizens of different States; — between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the Supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the Supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place of Places as the Congress may by Law have directed.

II.

28 U.S.C. §1254. Courts of appeals; certiorari; appeal; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By appeal by a party relying on a State statute held by a court of appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States, but such appeal shall preclude review by writ of certiorari at the instance of such appellant, and the review on appeal shall be restricted to the Federal questions presented;

(3) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

III.

28 U.S.C. §1333. Admiralty, maritime and prize cases

The district courts shall have original jurisdiction, exclusive of the courts of the States, of:

(1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.

(2) Any prize brought into the United States and all

proceedings for the condemnation of property taken as prize. June 25, 1948, c. 646, 62 Stat. 931; May 24, 1949, c. 139, §79, 63 Stat. 101.

IV.

33 U.S.C. §154. Adoption of rules for navigation of harbors, rivers and inland waters.

The following regulations for preventing collisions shall be followed by all vessels upon the harbors, rivers, and other inland waters of the United States except the Great Lakes and their connecting and tributary waters as far east as Montreal, and the waters of the Mississippi River between its source and the Huey P. Long Bridge and all of its tributaries emptying thereinto and their tributaries, and that part of the Atchafalaya River above its junction with the Plaquemine-Morgan City alternate waterway, and the Red River of the North, and are declared special rules duly made by local authority. June 7, 1897, c. 4, §1, 30 Stat. 96; May 21, 1948, C 328, §1, 62 Stat. 249; Aug. 8, 1953, c. 386, §1, 67 Stat. 497.

§ 740. Extension of admiralty and maritime jurisdiction; libel in rem or in personam; exclusive remedy; waiting period

The admiralty and maritime jurisdiction of the United States shall extend to and include all cases of damage or injury, to person or property, caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land.

In any such case suit may be brought in rem or in personam according to the principles of law and the rules of practice obtaining in cases where the injury or damage has been done and consummated on navigable water: *Provided*, That as to any suit against the United States for damage or injury

done or consummated on land by a vessel on navigable waters, the Public Vessels Act or Suits in Admiralty Act, as appropriate, shall constitute the exclusion remedy for all causes of action arising after June 19, 1948, and for all causes of action where suit has not been hitherto filed under the Federal Tort Claims Act: *Provided further,* That no suit shall be filed against the United States until there shall have expired a period of six months after the claim has been presented in writing to the Federal agency owning or operating the vessel causing the injury or damage.

§ 658. Payment of claims, policies other than life and health and accident; penalties

All insurers issuing any type of contract other than those specified in R.S. 22:656 and 22:657 shall pay the amount of any claim due any insured including any employee under Chapter 10 of Title 23 of the Revised Statutes of 1950 within sixty days after receipt of satisfactory proofs of loss from the insured, employee or any party in interest. Failure to make such payment within sixty days after receipt of such proofs and demand therefor, when such failure is found to be arbitrary, capricious, or without probable cause, shall subject the insurer to a penalty, in addition to the amount of the loss, of 12% damages on the total amount of the loss, payable to the insured, or to any of said employees, together with all reasonable attorney's fees for the prosecution and collection of such loss, or in the event a partial payment or tender has been made, 12% of the difference between the amount paid or tendered and the amount found to be due and all reasonable attorney's fees for the prosecution and collection of such amount. Provided, that all losses on policies covering automobiles, trucks, motor propelled vehicles and other property against fire and theft, the amount of the penalty in each of the above cases shall be 25% and all reasonable attorney's fees.

CERTIFICATE OF SERVICE

I hereby certify that three true and correct copies of the foregoing Brief of Petitioners have been served on the Honorable Dorsey Martin, III, Maughan, Atkinson & Martin, Ltd., 1755 Wooddale Boulevard, Baton Rouge, Louisiana 70806, counsel of record for respondents, Pansy F. Richardson, Donald B. Richardson, Patrick S. Richardson, Joseph S. Richardson, Larry S. Richardson and Carla Richardson, and on the Honorable Victor L. Marcello, Talbot, Sotile, Carmouche, Marchand & Marcello, Post Office Drawer 669, Donaldsonville, Louisiana 70346, counsel of record for June G. Allen by depositing said copies in the U.S. mail, postage prepaid, this 16 day of November, 1981.

I further certify that all parties required to be served have been served.

Arthur A. Andrews

ARTHUR HOWELL ANDREWS

Office - Supreme Court, U.S.
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ALEXANDER L. STEVAS,
CLERK

NO. 80-2134

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

FOREMOST INSURANCE COMPANY AND SHIRLEY ELISER,

Petitioners,

Versus

PANSY F. RICHARDSON, DONALD B. RICHARDSON, PATRICK S. RICHARDSON, JOSEPH S. RICHARDSON, LARRY S. RICHARDSON, CARLA RICHARDSON, AND JUNE G. ALLEN,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF RESPONDENTS

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QUESTION PRESENTED

Whether the admiralty jurisdiction of the Federal Courts encompasses a collision between two pleasure boats on navigable water resulting from the failure of one or both pilots of said vessels to observe established federal navigational rules.

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STATEMENT OF THE CASE

Respondents adopt the petitioners' statement of the case with the following exceptions and/or additions:

A. Respondents do not agree with petitioners' analogy of the United States Court of Appeals, Fifth Circuit's decision where it is stated that the Fifth Circuit abandon any requirement that the complained of activity have any connection to commerce or did not imply any commercial requirement in defining "traditional maritime activity." Respondents further feel that said evaluation is improper to assert in a statement of the case.

B. Respondents likewise do not agree with petitioner's analogy of the Supreme Court decision in Executive Jet, Inc., v. City of Cleveland, Ohio, 409 U.S. 249, 93 S.Ct. 493, 34 L.Ed.2d 454, as mandating some "commercial connection to the location of the wrong," nor do respondents feel that said analogy is properly asserted in a statement of the case.

C. Respondents wish to point out that the collision involved in this case occurred between two

pleasure vessels, one southbound and the other northbound, when, upon meeting in the river, one or both operators turned their respective boats to the left and toward each other instead of outward toward the banks of the river.

D. Finally, respondents wish to point out that the collision complained of in this case occurred on a navigable body of water, the Amite River, at a point susceptible to commerce albeit seldom used for commercial activities.

SUMMARY OF ARGUMENT

The Court of Appeals for the Fifth Circuit correctly held admiralty jurisdiction applicable to a collision between two pleasure boats upon the Amite River arising out of the failure of one or both operators of said pleasure boats to observe established navigational rules. The decision correctly applied the principles established in Executive Jet Aviation, Inc., v. City of Cleveland, Ohio, 409 U.S. 249, 93 S.Ct. 493, 34 L.Ed.2d 454, even assuming a broad interpretation of said case's holding. The Fifth Circuit's decision recognizes a federal interest in protection of navigation on a navigable water,

promotes uniformity of navigational rules on navigable bodies of water, and makes jurisdiction readily ascertainable to the parties involved in a collision upon navigable waters.

ARGUMENT

Prior to the Supreme Court's decision in Executive Jet Aviation, Inc., v. City of Cleveland, Ohio, 409 U.S. 249, 93 S.Ct. 493, 34 L.Ed.2d 454 (1972), there was no serious question as to admiralty jurisdiction encompassing a case involving a collision between two pleasure boats on a navigable body of water. All three previous Supreme Court decisions dealing with pleasure craft were decided as being within that admiralty jurisdiction. Levinson v. Deupree, 345 U.S. 648, 97 L.Ed. 1319, 73 S.Ct. 914 (1953), a wrongful death action arising out of a collision between two motor boats on the Ohio River; Coryell v. Phipps, 317 U.S. 406, 63 S.Ct. 291, 87 L.Ed. 363 (1943), an action by the owner of a pleasure boat for damages from fire on said pleasure craft; and Just v. Chambers, 312 U.S. 383, 85 L.Ed. 903, 61 S.Ct. 687 (1941), an action arising from carbon monoxide poisoning in a cabin cruiser.

The question becomes to what extent did Executive Jet Aviation, Inc., v. City of Cleveland, Ohio, (supra), modify these earlier Supreme Court decisions as they affect the definition of admiralty jurisdiction when applied to pleasure boat torts. The most narrow interpretation of that case would simply hold that maritime locality alone is not a sufficient predicate for admiralty jurisdiction in aviation tort cases but that in said aviation tort cases the wrong must bear a significant relationship to traditional maritime activities. Clearly, under such a narrow interpretation, Executive Jet Aviation, Inc., v. City of Cleveland, Ohio, (supra), would have little effect upon the prior Supreme Court cases dealing with pleasure craft. If interpreted broadly, the case holds that in determing whether admiralty jurisdiction exists in any tort claim, there must be a significant relationship between the wrong and traditional maritime activities.

Even assuming that such a broad interpretation was intended, admiralty jurisdiction should be properly concluded under the facts of this case since the wrong bears a significant relationship to traditional

maritime activity. Those facts undisputedly reveal that a collision occurred between two pleasure boats on navigable water directly caused by the failure of one or both pilots of said pleasure boats to observe uniformly established "rules of the road" for navigation on water bodies by all vessels, commercial or otherwise. There is a compelling federal interest in protection of navigation on navigable waters. Such an interest establishes a historical as well as a present significant relationship to traditional maritime activity. In Executive Jet Aviation, Inc., v. City of Cleveland, Ohio, (supra), the Supreme Court recognized the connection between the regulation of vessels on navigable water and traditional maritime activities when the Court states as follows (p. 270):

> "The law of admiralty has evolved over many centuries, designed and molded to handle problems of vessels relegated to ply the waterways of the world, beyond whose shores they cannot go. That law deals with navigational rules . . . rules that govern the manner and direction those vessels may rightly move upon the waters. When a collision occurs or a ship founders at sea, the law of admiralty looks to these rules to determine, fault, liability, and all other questions that may arise from such a catastrophe."

Congress has recognized a strong federal interest and nexus to traditional maritime activities being apparent where violation of navigational rules are at issue. Federal law has for many years provided statutory navigational safety rules and has so defined vessels under said rules to make them applicable to pleasure crafts. 1 U.S.C. §3 (1970); 33 U.S.C. §§151-232 (1957); 33 U.S.C. §§241-295 (1958); 33 U.S.C. §§302-356 (1958). Kelly v. Smith, 485 So.2d 520 (5th Cir. 1973); St. Hilaire Moye v. Henderson, 496 F.2d 973 (8th Cir. 1974).

In addition, the U.S. Coast Guard is charged with the duties of investigating accidents upon navigable waters, rescuing those in difficulty upon said waters and in general enforcing the "rules of the road." In an attempt to see that the Coast Guard's functions not be needlessly hazardous, Congress has sought to further said federal interest by the enactment of regulations pertaining to the type of equipment that must be carried on all vessels, pleasure or otherwise. Federal Motorboat Act of 1940, 46 U.S.C. 526 (1940).

In addition to the traditional maritime nexus arising out of the federal interest in regulation of

navigation upon navigable waters, there is a federal interest and maritime nexus in seeing that bodies of water susceptible to commerce are free from obstacles that would impede said commerce. The record preponderates to the legal conclusion that the collision occurred on navigable waters as defined in the time-honored case, The Daniel Ball, 77 U.S. (10 Wallace) 557, 19 L.Ed. 999 (1870), p. 563:

> "Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition as highways of commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water. They constitute navigable waters of the U.S. within the meaning of the acts of Congress, in contradiction from the navigable waters of the states, when they form in their ordinary condition by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other states or foreign countries in their customary modes in which said commerce is conducted by water."

The Amite River meets the definition of navigability as outlined above. The data from the Corps of Engineers (R81-83) not only reveals the Amite River to be navigable but also points out that a federal project was conducted to provide the reasonable

demands of commerce on said river and to provide a channel for commerce from the Amite River through Lake Maurepas to the Gulf of Mexico. The Department of Army report (R103-119 at 105) shows the depth of the Amite River near the point of collision in April, 1977, to be eight feet, within a range permitting commercial vessel use. Finally, the report of the Department of Transportation of the State of Louisiana (R136-139) reveals numerous openings of the bridges for vessels along the Amite River near the point of collision, indicating commercial activity upon said river. These records show the Amite River to be susceptible to commerce if not in fact used for commerce. The Amite River in connection with Lake Borne and Lake Pontchatrain provide a navigable route for commercial activity through the state to the Gulf of Mexico and to foreign waters. No one would dispute that traditional maritime nexus encompasses the establishment of rules for navigation to promote the free flow of goods and services on waters susceptible to commerce.

Most district and appellate post Executive Jet cases are consistent in holding where injuries result

from a disregard of proper navigational rules or from obstacles impeding navigation, a traditional maritime nexus is found sustaining admiralty jurisdiction. Gilmore v. Witschorek, 411 F.Supp. 491, (E.D. Ill., 1976), held that federal admiralty jurisdiction encompassed a collision between two pleasure boats on navigable water in a wrongful death case. Kayfetz v. Walker, 404 F.Supp. 75 (D.C. Conn. 1975), upheld admiralty jurisdiction where the injuries complained of arose out of a collision between two sailing yachts during a sporting race. St. Hilaire Moye v. Henderson, (supra), held admiralty jurisdiction available where a passenger in a pleasure boat was thrown into the water and injured when the operator of the pleasure boat placed the boat in reverse gear while traveling forward.

Several cases have upheld admiralty jurisdiction where pleasure boats encountered certain navigational hazards. A pleasure craft crashed into a sunken barge on an inland river in Lane v. U.S., 529 F.2d 175 (4th Cir. 1975); a skier behind a pleasure boat crashed into the submerged edge of a barge in Kaiser v. Travelers Insurance Co., 359 So. 90, (E.D. La. 1973);

a pleasure boat incurred damage by an oil spill in the Santa Barbara Channel in Oppen v. Aetna Insurance Co., 485 F.2d 262 (9th Cir. 1973); a pleasure boat struck an unlit flare piping in Gere v. Chevron Oil Co., 574 F.2d 243 (5th Cir. 1978). In Brown v. U.S., 403 F.Supp. 472 (C.D. Ca. 1975) a man was killed when the mast of his pleasure boat struck a low power line strung across the Colorado River. The court considered the power line an impediment to navigation. All these courts found that the harm encountered bore a significant relationship to traditional maritime activity, i.e., navigation; likewise, a fortiori, in regard to a collision occurring between two pleasure boats on navigable waters. A collision between two vessels in navigable waters presents a potential danger to all vessels, pleasure and commercial, which are engaged in navigation. It is submitted that where dangers or obstacles to maritime commerce or navigation are presented or generated, or where maritime navigational "rules of the road" are violated, a sufficient relationship to traditional maritime activity should be found to exist and a federal interest is served by having said cases decided under federal

admiralty law.

The proper focus of maritime law should be upon waterbound vessels, pleasure or otherwise, rather than upon water borne commerce also. This is true because there is a federal interest in protecting navigation and commerce on navigable waters since water borne vessels, whether commercial or non-commercial, clearly create a potential threat to navigation and commerce. Admiralty Jurisdiction Over Pleasure Craft Torts, 36 Md. L.R., p. 225.

The cases of Adams v. Montana Power Co., 528 F.2d 437 (9th Cir. 1975); Chapman v. United States, 575 F.2d 147 (7th Cir. 1978); and Livingston v. U.S., 627 F.2d 1965 (8th Cir. 1980), holding no admiralty jurisdiction, can be distinguished from the above-cited cases since the bodies of water involved therein were deemed non- traversable by commercial vessels and thus non-navigable within the definition of The Daniel Ball, (supra).

The Fifth Circuit in Kelly v. Smith, (supra), in light of the Supreme Court case of Executive Jet Aviation, Inc., v. City of Cleveland, Ohio, (supra), established four factors to consider in determining

whether the wrong bears a sufficient relationship to a traditional maritime activity in tort claims on navigable water involving pleasure boats. An analysis of those factors in light of the factual situation of this case reveals a clear nexus to traditional maritime activity. In regard to the factor of function and role to the parties, both parties were actively engaged in the navigation of their vessels, although for pleasure. Secondly, regarding the type of vessels and instrumentality involved, both vessels were pleasure boats; however, no non-navigable vessel or instrumentality was involved in the collision. Thirdly, regarding the causation factor, the collision and resulting injuries resulted from the failure of one or both of the pilots of the pleasure vessels to regard the proper rules for navigation established under federal laws and applicable to the pleasure boats. Finally, regarding the factor described as "the traditional concept of the historical role of admiralty jurisdiction," courts have recognized that admiralty affords remedies to those injured while traveling navigable waters, especially due to error of navigation. St. Hilaire Moye v. Henderson, (supra).

Respondent agrees with the majority of the lower federal courts' interpretation of Executive Jet Aviation, Inc., v. City of Cleveland, Ohio, (supra), requiring the finding of a significant relationship to traditional maritime activity in addition to the locality requirement for all torts occurring between pleasure boats. The test is fair and has proved to limit admiralty jurisdiction to cases of federal interest and traditional maritime activity. Under the factual situation, the present case clearly falls within the interpretation of said test. The nexus to traditional maritime activity is apparent where violations of navigational rules are at issue.

In addition to the existence of a nexus to traditional concepts of maritime activities where a collision involving failure to apply proper navigational rules by pleasure boat operators occurs on navigable waters, policy consideration militates toward upholding admiralty jurisdiction in such cases. This policy stems from the national interest in uniformity of navigational rules and the judicial interest in providing a readily ascertainable jurisdiction for all those individuals subjected to the hazards of

waterbound transportation on our navigable river "the highways of admiralty" as stated most clearly in the case of St. Hilaire Moye v. Henderson, (supra), p. 979:

> "The navigation of waterbound vessels in those waters, even if not directly engaged in commerce themselves, presents a potential danger to the operation of vessels which are engaged in commerce on said waters. This is the very basis of law requiring vessels used on navigable waters to meet certain safety and operational standards. The law of admiralty must surely cover the operation of vessels which present potential danger to commerce on navigable waters."

The enactment of federal navigational and safety rules and their applicability to all vessels, pleasure or commercial, established a congressional intent to provide for uniformity of these rules on all navigable waterways for the enhancement of commerce and safety. The exclusion of pleasure boats from admiralty tort jurisdiction while keeping said boats under federal navigational rules would frustrate a recognized federal policy and federal interest in protection of navigation on navigable waters. Admiralty Jurisdiction Over Pleasure Craft Torts, 36 Md. L.R. 212 (1976), p. 229. The Fifth Circuit, in its decision, recognized this need for uniformity and ascertainability of jurisdiction (J. A. 33-38).

If the court were to believe the appellant's argument and predicate admiralty jurisdiction upon commercial activity, all types of conflicts and uncertainties would arise, destroying the recognized federal interest in uniformity. In collisions involving non-commercial navigators and non-commercial vessels, there could be fifty different sets of navigational rules whose applicability would depend upon the location of the collision in reference to the territorial jurisdiction of each state within the United States. There could be different sets of navigational rules for such non-commercial vessels on the same navigable body, i.e., the Mississippi River, depending upon which state you happen to be in at the time of the mishap.

Likewise, with different navigational rules for commercial vessels (federal rules of the road) as opposed to non-commercial vessels (state rules), it might not be readily ascertainable prior to a collision between a pleasure vessel and a commercial vessel as to the true nature of each vessel's activity, commercial or pleasure, and thus what proper navigational rule would govern the situation. In many

cases, the correct rule of navigation could not be accurately determined by the parties prior to the collision in an effort to apply the proper navigational rules to avoid the same but could be determined only by the court at trial after the collision, depending upon the evidence presented as to the nature of a vessel's activity, i.e., being sufficiently commercial so as to invoke a federal navigational rule, or purely pleasurable, thus invoking state rules of navigation. Further, a vessel, although appearing commercial when seen upon the navigable water, might later turn out to be purely pleasurable, invoking a different set of navigational rules since said commercial-appearing vessel was not at the time of the collision engaged in commercial activity and possibly had not been engaged in said activity for quite some time. In the same light, a bass boat might seem purely pleasurable to the naked eye; but due to the fact that the fish being caught are sold to seafood outlets, it would thus be engaged in commercial activities, and different navigational rules would apply. Havoc would result. In order to keep the roads of admiralty free for commerce without restraint, it is imperative that uniform

admiralty law extend to non-commercial as well as to commercial navigators on those bodies of water susceptible to commerce and commercial activity. Even Professor Stolz, who is quoted extensively by petitioners in their brief, recognized the need for uniformity of navigational rules when he stated as follows regarding the scope of admiralty jurisdiction:

> "Clearly a federal interest exists with respect to such a matter as the rules of navigation, rights-of-way, and lights to be carried, which must necessarily control both big ships and little ships and as to which there is a clear virtue in national uniformity." P. 663.

The easiest case for an application of federal law to pleasure boating involves the rules of the road, such as rules of passing and turning, rules of right-of-way, and rules concerning running lights. By the terms of the federal statute, these rules are applicable to all vessels on navigable waters, and the rules of necessity must be applicable to pleasure boats. It would be intolerable to have conflicting rules on any particular body of water. Pleasure Boating and Admiralty: Erie at Sea, 51 Cal. L.R., pp. 712-713.

Further, as stated by the Fifth Circuit in its decision (J.A. 36-37), it would be introducing another note of uncertainty to hold that admiralty jurisdiction extends only to stretches of navigable water that presently function as commercial arteries. It would place too great a burden on pilots of navigable bodies to ascertain commercial activity at each point during navigation. It is clear that the federal interest in uniformity must be far broader than merely commercial maritime traffic given the policy adopted by the Supreme Court on the matter of federal interest. Executive Jet Aviation, Inc., v. City of Cleveland, Ohio, (supra), pp. 269-270.

There is a most significant consideration that both private and commercial vessels operate upon the same medium; hence, a uniform set of rules of the road is virtually required to regulate operations. To this extent, federal rules should be controlling.

> "It would be highly inconsistent to have created a separate body of law for maritime commerce in order to provide uniformity and predictability for legal affairs because those affairs are primarily interstate and international, and at the same time exclude vessels having the same extent of operation simply because those operations are not for

profit." Admiralty Jurisdiction Over Pleasure Craft Torts, 36 Md. L.R., p. 278.

Jurisdiction should be as readily ascertainable as courts can make it, and jurisdiction is made readily ascertainable by having federal admiralty law and its navigational rules applicable to all tort activity involving disregard of federal navigational rules upon navigable waters.

CONCLUSION

Admiralty jurisdiction should encompass a collision between two pleasure boats on navigable waters arising out of the failure of the pilots of said boats to heed federally established navigational rules. Admiralty law has traditionally been concerned with furnishing remedies for those traveling navigable water. To hold otherwise would impede commerce rather than promote it, as was one of the recognized intents of Congress in establishing separate federal admiralty laws. In addition, policy considerations of uniformity of navigational law, established federal interest with the uniformity of these laws, and policy considerations ensuring a readily ascertainable jurisdiction militates toward upholding admiralty

jurisdiction for all vessels colliding on navigable waters. The benefits derived from the uniformity of navigational rules and jurisdiction outweigh any justification for the maintenance of state comity and application of individual state rules and procedure.

A decision by this Court upholding admiralty jurisdiction as applied to the facts of this case does not extend or distort the traditional concept of admiralty jurisdiction but only recognizes that a traditional maritime nexus exists in regulating navigation upon our navigable waters.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that three true and correct copies of the foregoing Brief of Respondent has been served on the Honorable Arthur Howell Andrews, Franklin, Moore & Walah, P. O. Box 3958, Baton Rouge, LA 70821, counsel of record for petitioners, Foremost Insurance Company and Shirley Eliser, and on the Honorable Victor L. Marcello, Talbot, Sotile, Carmouche, Marchand & Marcello, P. O. Drawer 669, Donaldsonville, LA 70346, counsel of record for June P. Allen, by depositing said copies in the United States mail, postage prepaid and properly addressed, this 18th day of December, 1981. I further certify that all parties required to be served have been served.

DORSEY C. MARTIN, III